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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 422

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY,
Respondent.

No.

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner, City of Kansas City, Missouri, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the United States District Court for the Western District of Missouri entered in the above case on July 16, 1962.

OPINIONS BELOW.

The opinion and order of the District Court dated August 3, 1962, is unreported and is printed in Appendix "A" attached hereto, *infra*, pp. A1-A13.

JURISDICTION.

The decision of the District Court was entered on July 16, 1962, pp. A24-A38, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

Whether or not the Federal doctrine of Fraudulent Concealment will toll Section 4B of the Clayton Act (15 U.S.C. 15(b)).

STATEMENT OF THE CASE.

Each of the complaints in the above entitled cases asserts a claim for treble damages under Section 4 of the Clayton Act (15 U.S.C. 15), resulting from a conspiracy to fix prices on specified types of electrical equipment in violation of Section 1 of the Sherman Act (15 U.S.C. 1); each of the respondents in the above cases moved for an order of the District Court dismissing the complaints pursuant to Rule 12 of the Federal Rules of Civil Procedure, or in the alternative for a Summary Judgment dismissing the complaints pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the reason that each complaint shows on its face that the petitioner's claim is barred by the applicable statute of limitations (Section 4B of the Clayton Act (15 U.S.C. 15(b)). The District Court after acceptance of briefs and hearing oral arguments sustained both respondent's motions on July 16, 1962.

Petitioner filed its Notice of Appeal on the same day the order sustaining respondent's motion was entered, July 16, 1962.

Motion to advance the cause on the docket was filed with the United States Court of Appeals for the Eighth Circuit on the 26th day of July, 1962. The Court of Appeals sustained this motion and the matter is now set for hearing on October 2, 1962.

STATUTES INVOLVED.

Clayton Act, Section 4 (15 U.S.C. 15). Suits by persons injured; amount of recovery.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 4B (15 U.S.C. 15(b)). Limitation of actions.

> "Any action to enforce any cause of action under sections 15 and 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 6 of this title shall be revived by said sections."

Clayton Act, Section 5 (15 U.S.C. 16). Judgment in favor of Government as evidence; suspension or limitations.

* * *

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder; any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant cases are in direct conflict with the decision of Judge Feinberg in *Atlantic City Electric Company* v. *General Electric Co. et al.*, (District Court of the Southern District of New York (July 11, 1962) 61 Civ. 4258 unreported, Appendix "B"). It is further noted that Judge Becker's decision in the instant case made note of the fact that the District Court of the Southern District of New York had made a contrary determination in its finding upon the same type of motion. Judge Becker further commented upon the status of the law and of the necessity of an early review by the highest court. Said the court, in the memorandum opinion, p. A6.

"* * * *In order to hasten the full review of the legal questions by the highest court by which they are reviewable*, this court has decided to sustain both the motion to dismiss and the motion for summary judgment. * * *." (Italics supplied).

2. At the present date there have been three decisions upon the question of whether or not the federal doctrine of fraudulent concealment tolls the statute of limitations contained in Section 4B of the Clayton Act. These are *Moviecolor, Ltd., v. Eastman Kodak Company*, 288 F.2d 80 (2d Circuit 1961) Certiorari denied 368 U.S. 821 (1961); *Dovberg* v. *Dow Chemical Company*, 195 F. Supp. 337 (Eastern District of Pennsylvania, 1961), and *Atlantic City Electric Company* v. *General Electric Company et al., supra.* All three of these decisions have held the doctrine of fraudulent concealment to be applicable to Section 4B of the Clayton Act, and the latest case, *Atlantic City Electric Company*, specifically held that a motion to strike, based upon Section 4B, would be denied where the complaints alleged the elements of fraudulent concealment. The instant case is the sole decision extant which refuses to apply the doctrine of fraudulent concealment to Section 4B.

3. As noted in the District Court's decision in the instant case (Appendix A) there are currently in excess of 1,700 treble damage actions grounded in the same fact structure as the instant case. Each of these cases has been classified as a "big case" and has been subjected to the procedure relating to protracted litigation under the auspices of the Judicial Conference of the United States. (Report of Judicial Conference Study Group, 1960, 25 F.R.D. 35.) This mass of litigation is seriously taxing the federal docket at the district court level, and, as noted by Judge Becker in his decision in the instant case, the system is sorely challenged in its capacity to administer the antitrust laws of the United States due to the quantum of electrical company conspiracy cases.

All of this pending litigation will be affected by the ultimate determination of the applicability of the federal

doctrine of fraudulent concealment to Section 4B of the Clayton Act. Until this question has been finally determined, discovery procedures in the over 1,700 pending District Court cases cannot proceed due to the impossibility of accurately limiting the scope of discovery. It is submitted that as a result of Judge Becker's decision, this mass of litigation is at a standstill until a final determination of the question is made. It is further submitted that an early decision on this issue by this Court will prevent piecemeal appeal in the over 1,700 cases pending at the District Court level.

It is respectfully suggested that the public interest and the effective judicial administration of the antitrust laws of the United States necessitates the earliest possible determination of this key question.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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City Counselor,
WILLIAM F. MAUER,
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2800 City Hall,
Kansas City, Missouri,
Attorneys for Petitioner.

Dated August ..., 1962.

On the exact date this petition was printed and returned to the petitioner another decision was rendered in this matter by the District Court for the Northern District of Illinois. The decision is also unreported and is attached to this petition marked Exhibit "C".

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

CITY OF KANSAS CITY, MISSOURI, a Municipal Corporation, Plaintiff.
vs.
FEDERAL PACIFIC ELECTRIC COMPANY, Defendant.
Civil No. 13709-1

CITY OF KANSAS CITY, MISSOURI, a Municipal Corporation, Plaintiff.
vs.
GENERAL ELECTRIC COMPANY, Defendant.
Civil No. 13710-2

Memorandum Opinion.

These two cases are antitrust actions at law for treble damages under Section 4 of the Clayton Act (15 U.S.C. 15) based upon alleged conspiracies in violation of Section 1 of the Sherman Act (15 U.S.C. 1). The actions arise out of the same alleged conspiracies which were the basis for indictments of manufacturers of electrical equipment products in the United States District Court for the Eastern District of Pennsylvania at Philadelphia in 1960, followed by convictions in 1961. Both actions were filed February 9, 1962.

These two cases are a part of the mass of civil antitrust cases filed in the United States District Courts fol-

lowing the indictments and convictions in Philadelphia. The number of such cases filed and pending in the nation presently exceeds 1700. Each of these cases is a "Big Case" and is properly classifiable as protracted litigation under the procedures for identification and processing of such cases, developed and published under the auspices of the Judicial Conference of the United States. (Report of Judicial Conference Study Group on Pretrial Procedure in Protracted Litigation (1960) 25 R.R.D. 35.)

This mass of litigation challenges the capacity and ability of the judicial system of the United States to perform its task of administering the antitrust laws of the United States in particular and to administer justice under law in general. (To meet this challenge to assist the United States courts struggling with the adjudication of these cases, a National Coordinating Committee for Multiple Litigation has been created. This Committee has established offices in Chicago and New York. The Committee is issuing recommendations for cooperative national action by the district courts and is disseminating informative material to the courts.)

One of the legal problems demanding earliest solution in order to provide a guide to courts and litigants for pretrial proceedings, trial, and any settlement negotiations that may occur, is the construction to be given to the applicable statute of limitations, Section 4B of the Clayton Act (15 U.S.C. 15(b)), which is dealt with in this memorandum opinion. It is imperative that this question be promptly decided at the highest judicial level at the earliest time consistent with law. Until this question is settled, the scope of discovery cannot be settled by the trial courts; the pleadings cannot be settled; the potential damages cannot be computed; and settlement negotiations cannot be fully explored in a great number of cases. There-

fore, counsel in the 71 cases pending in this district were requested to take steps to expedite final determination of the construction to be given to Section 4B of the Clayton Act in light of the claim that the four-year period of limitations provided thereby does not begin to run until the plaintiff, in a particular case, knows of the existence of the alleged conspiracy, or by the exercise of reasonable diligence could have learned of the existence thereof.

Fortunately, it was discovered that, in these two actions instituted by the City of Kansas City, all purchases relied upon in the claims for relief occurred in 1954, more than four years prior to the time when the plaintiff alleges it knew, or in the exercise of reasonable diligence could have known, of the existence of the alleged conspiracy.

Counsel for the plaintiff, Kansas City, was granted leave to amend the complaints to aver all facts which might possibly be proved to avoid the limitation of these actions by Section 4B of the Clayton Act.

AVERMENTS OF THE COMPLAINTS.

The First Amended Complaint, in each of these cases, charges the formation and existence of an actionable combination and conspiracy in violation of Section 1 of the Sherman Act, beginning at least as early as 1948, and consequent damage to plaintiff arising out of purchases in the year 1954 only. (The items purchased in Case No. 13709-1 were circuit breakers, and in Case No. 13710-2 were power switching equipment.)

Said complaint in each case charged the indictment of the defendants in the United States District Court for the Eastern District of Pennsylvania on May 19, 1960, and subsequent conviction because of the same alleged conspiracy on which the complaint is based.

In order to show that the actions are not barred by Section 4B of the Clayton Act, the complaint in each case contains a paragraph 13 under the subheading "Fraudulent Concealment" which reads as follows:

"From the inception of the combination and conspiracy between defendants described in paragraphs 9, 10 and 11, which was at least as early as January 1, 1948, and continuously thereafter until at least May 25, 1960, defendants resorted to and maintained in effect various procedures and means for the purpose of concealing the existence of their conspiracy. These included secret meetings of officers and employees of the defendants at various places in the country, the placing of telephone calls to and from the residences of company representatives rather than their offices, the use of public pay telephones, the use of plain envelopes addressed to the homes of such representatives without any return addresses or other means for identifying the senders, and the concealment or destruction of records respecting the conspiracy. During all of the period of time mentioned above, defendants established and used a scheme or formula designated the 'phase of the moon' or 'light of the moon' formula, for quoting nearly identical prices to electrical utility companies and municipal corporations, including plaintiff. Code numbers identifying the defendant corporations were used in documents effectuating said 'phase of the moon' formula. Through the cyclic rotating positioning inherent in said formula, one defendant corporation would quote the low price, others would quote intermediate prices, and another would quote the high price. These positions were periodically rotated among the defendant corporations and said formula was so calculated that in submitting prices to electrical utility companies and municipal corporations, including plaintiff, the price spread between defendant corporations would be sufficiently narrow so as to eliminate actual price competition among them but sufficiently wide so as to give an ap-

pearance of competition. Said formula was designed to permit each defendant corporation to know the exact price it and every other defendant corporation would quote on each prospective sale. By the use of said formula and other means defendants rigged price quotations and bids to purchasers, including plaintiff, and so represented their prices to plaintiff as to give the appearance of competitive bidding and pricing and by such means caused plaintiff to believe that it was receiving competitive prices. By such means and through other deliberate acts defendants from the inception of said conspiracy and continuously thereafter until at least May 25, 1960, fraudulently concealed the existence of their combination and conspiracy and plaintiff had no knowledge, nor could it by the exercise of reasonable diligence have obtained knowledge, of the existence of said combination and conspiracy until after the institution of the proceedings described in paragraph 12."

The defendants have moved to dismiss or for summary judgment on the grounds that: (1) plaintiff's complaint under Section 4 of the Clayton Act was filed February 1, 1962, and amended March 3, 1962; (2) the amended complaint shows on its face that the claim for relief of plaintiff accrued more than four years prior to the date upon which plaintiff's complaint was filed; (3) Section 4B of the Clayton Act provides that any cause of action under Section 4 of the Clayton Act shall be forever barred unless commenced within four years after the cause of action accrued; (4) Section 4B of the Clayton Act is substantive rather than procedural in character, is absolute, and cannot be tolled for fraudulent concealment of the cause of action, pending discovery thereof.

The plaintiff has agreed that the motions to dismiss and for summary judgment are in condition for decision on the averments of the First Amended Complaint. There-

fore the rule of *Poller* v. *C.B.S.*, 368 U.S. 464, 7 L. Ed. 2d 458, is not applicable to the motion for summary judgment in these cases.

DECISION.

These cases have been fully and ably briefed and argued in this Court by counsel for the parties and by counsel in the nine companion cases which will be substantially affected by the decision in these cases. The presentation of counsel on both sides deserves a careful review of the arguments, authorities and reasoning. More important, however, is a speedy decision in a form which will reach, as soon as possible, the highest judicial level for review and final determination. At this district court level, and in the present state of the authorities, the question could honestly be decided either way. In fact, the decisions of the district courts on the general question have been conflicting. In order to hasten the full review of the legal questions by the highest court by which they are reviewable, this Court has decided to sustain both the motion to dismiss and the motion for summary judgment, with a brief review of the contentions of the parties and of the friends of the Court, to whom the Court is indebted for their excellent arguments and briefs.

STATE OF AUTHORITIES.

The question presented in these cases has not been directly passed upon by the Supreme Court of the United States. It is claimed by the plaintiff, and denied by the defendants, that the question was decided by the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*, 288 F.2d 80. The District Court for the Eastern Districts of Pennsylvania has upheld the views of the plaintiff in *Dovberg* v. *The Dow Chemical Co.*, 195 F. Supp. 337. The District Court for the Southern District

of New York has adopted plaintiff's view of the *Movie-color* case in *Atlantic Electric Co.* v. *General Electric Co.*, No. 61 Civ. 4258, dated July 11, 1962 (not yet reported). The Court's attention has been invited to no other decision on the issue accompanied by written opinion.

Therefore, it is concluded that this is an unsettled question of great importance.

BASIS OF DECISION.

The basis for the decision in these cases, that the "fraudulent concealment" averments of paragraph 13 of the complaint do not suspend the running of the four-year period, is the determination that Congress did not intend that the running of the four-year period of limitations be suspended by fraudulent concealment of the prohibited conspiracy.

This conclusion is by no means free of doubt. Cogent arguments can be, and have been, made in support of a contrary determination.

In reaching the determination that Congress did not intend that the running of the statute be suspended by active fraudulent concealment, a distinction is recognized between active fraudulent concealment and lack of discovery by the injured party unaccompanied by activity designed to conceal the existence of the conspiracy. The considerations which have led to the decision made in the cases at bar are the following:

I.

Section 4B does not contain an express exception suspending the running of the four-year period until discovery of the wrong or during the time the wrong was fraudulently concealed, such as contained in the Tariff

Act of 1930 (19 U.S.C. 1621) and in the Securities and Exchange Act (15 U.S.C. 78r(c)). Furthermore, section 5(b) creating an exception during the pendency of a civil or criminal proceeding instituted by the United States is evidence of the intent of Congress to limit exceptions to 4B to the provisions of section 5(b) (15 U.S.C. 16). So the Clayton Act is not silent on the subject matter of suspension of the running of, and exceptions to, the limitations set forth in section 4B.

II.

The legislative history of section 4B in the 81st, 82nd, 83rd and 84th Congresses contains evidence that express provisions suspending the running of the statutes until the date of discovery were deliberately eliminated in the perfection of the Bill before final passage by the 84th Congress. In this connection it is noted that there is a confusing colloquy between Committee Chairman Celler and Congressman Patman on this subject appearing at 101 Congressional Record 5132-5133 which contains ambiguous statements lending some aid to the position of the plaintiff. (A brief summary of legislative history and a transcript of the Celler-Patman colloquy is attached and marked Exhibits A and B respectively.)

III.

The decision of this Court is supported by the long-established rule that, when Congress creates a new right of action and explicitly limits the time in which the action may be brought, the explicit limitation governs and is not affected by the general federal doctrine employed to bar inequitable reliance on statutes of limitation. Some doubt is cast upon the applicability of this rule by *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 3 L. Ed. 2d 770, l.c. 773. Nevertheless, the rule has been long estab-

lished in federal jurisprudence and is of some value in ascertaining congressional intent. This rule found its earliest and widest application in the field of conflict of laws in cases involving suits on causes of action created by a statute of a state other than the forum, as in statutory actions for wrongful death. *Restatement, Conflict of Laws*, Sec. 605 (1935); Beale, *The Conflict of Laws*, Sec. 605. This rule has been followed or recognized in federal jurusprudence in the following cases, among others:

State statutes involved: *Davis* v. *Mills*, 194 U.S. 451, 48 L. Ed. 1067; *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358.

Federal statutes involved: *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 88 L. Ed. 96; *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633, 69 L. Ed. 1126; *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Comm.*, 246 U.S. 638, 62 L. Ed. 914, all dealing with the Interstate Commerce Act; *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 58 L. Ed. 893 dealing with Materialmen's Act.

The rule is applicable even though the period of limitation is provided in a different, subsequent legislative act provided the subsequent act is directed to the legislatively created cause of action. *Davis* v. *Mills*, 194 U.S. 451, 48 L. Ed. 1067.

The rule seems applicable in a treble damage cause of action, under Section 4 of the Clayton Act, which was created by congressional act in 1914, and which replaced Section 7 of the Sherman Act. Section 4B containing the four-year limitation was enacted in 1955 and became effective in 1956. It became, by amendment, a part of the Clayton Act which created the treble damage cause of action.

This rule is characterized by the holding that lapse of the prescribed time operates to extinguish the right, which is the foundation for the claim, rather, than to bar the enforcement thereof. *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, l.c. 359, 88 L. Ed. 96, l.c. 100.

The rule is recognized in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 90 L. Ed. 743, relied upon the plaintiff, in the following language:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." (327 U.S. l.c. 395, 90 L. Ed. l.c. 746).

Undoubtedly there are general federal doctrines providing relief for the victims of fraud which are read into every federal statute of limitations where Congress is silent on the matter. *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 3 L. Ed. 2d 770. *Holmberg* v. *Armbrecht, supra; Exploration Co.* v. *United States*, 247 U.S. 435, 62 L. Ed. 1200; *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636; Annotations, 3 L. Ed. 1886, 130 A.L.R. 8, supp. 24 A.L.R. 2d 1413. As stated earlier, generally these doctrines are not applicable where there is a newly created statutory cause of action and a special statute explicitly limiting the time for action thereon. But there are cases where the general federal doctrines are applied to special statutes of limitation applicable to legislatively created or expanded causes of action which did not exist before. *Glus* v. *Brooklyn Eastern District Terminal, supra*, a unanimous opinion in a Federal Employers' Liability Act case; Annotation, 3 L. Ed. 2d l.c. 1888.

All this brings us back to the critical inquiry under *Glus* and *Holmberg*, whether in respect of the particular

cause of action, Congress has explicitly or clearly indicated its intention to exclude application of general doctrines suspending tolling of, or estopping the application of, statutes of limitations.

Whether the statute clearly shows an intention to exclude the application of general doctrines is a matter of opinion which can be settled finally only by the court of last resort.

IV.

Some consideration must be given to the subject matter of the new cause of action. It is conceivable that general equitable principles of estoppel may be applicable to limitations in Federal Employers' Liability Act cases involving tort actions by employees, as held in *Glus*, and the same principles be inapplicable in actions based on conspiracy which is ordinarily secretive in nature. The fact that Congress, in enacting section 4B, was legislating against conspiracies ordinarily concealed, is entitled to some consideration in determining the congressional intent.

V.

The foreseeable effects of the application of equitable principles of suspension and estoppel upon the ability of the courts to process anticipated litigation should be given some consideration. In this connection there is the practical consideration that these antitrust cases and other cases ordinarily on the dockets may overtax the capacities of the courts if the period of limitation can be extended backward in time as contended by the plaintiff. Congress should be assumed to have had in mind the capacity of the courts to process the authorized litigation. If plaintiff's contention is sustained there is no definite limit in time beyond which treble damage actions are barred.

For these five reasons, among others, the conclusion is reached that the motions to dismiss and for summary judgment should be sustained.

Before closing, consideration should be given to the *Moviecolor* case relied upon by the plaintiff.

THE MOVIECOLOR CASE.

In a thoughtful opinion, Judge Feinberg of the District Court for the Southern District of New York has reached a conclusion contrary to that expressed in this memorandum. *Atlantic Electric Co.* v. *General Electric Co.*, No. 61 Civ. 4258, dated July 11, 1962. This conclusion was based upon an analysis of the opinion of the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*, 288 F.2d 80. *Moviecolor* is binding on the District Courts of the Second Circuit and strongly persuasive in its holding. There is a considerable difference of opinion concerning the interpretation to be given to *Moviecolor*. There is a serious question whether, viewed in the light most favorable to plaintiff, *Moviecolor's* holding is *dictum*. The Southern District of New York in *Atlantic Electric* took the position that even if *Moviecolor* was *dictum* on this issue, it was controlling. This Court is not compelled to take the same position in the absence of any expression by the Court of Appeals for the Eighth Circuit. Therefore, the refinements of *Moviecolor* will not be discussed. Judge Feinberg seems to have made a scholarly appraisal of that case in *Atlantic Electric*, but *Moviecolor*, although entitled to great respect, is not final in any view because the court rendering the opinion is not the court of last resort.

In addition to those already mentioned, there are other cases supporting plaintiff's view, including the clear holding in *Dorberg* v. *The Dow Chemical Co.*, (E.D. Pa.)

195 F. Supp. 337. They have been given serious consideration in reaching the conclusion expressed herein.

For the assistance of those reviewing this ruling there are attached hereto summaries of the principal points and authorities relied upon by the plaintiff and the defendants in this matter, marked Exhibits C and D respectively.

William H. Becker,
District Judge.

Kansas City, Missouri,
August 3, 1962

EXHIBIT A.

BRIEF SUMMARY OF LEGISLATIVE HISTORY OF SECTION 4B OF CLAYTON ACT.

The following list shows the bills considered by various congresses prior to the adoption of H.R. 4954 by the First Session of the 84th Congress:

81st Congress, 1st Session

S. 1910, H.R. 4985

(1) a six-year statute of limitations for private treble damage suits;

(2) in the case of conspiracy, six years after the date of discovery of the facts upon which the plaintiff relies.

81st Congress, 2nd Session

H.R. 7905

(1) United States may recover actual damages;

(2) six-year statute for both Government and private damage suits;

(3) six years after discovery for both United States and private plaintiffs;

(4) suspension of statute during pendency of Government criminal or civil suit applicable to damage suits of United States as well as private plaintiffs;

(5) judgment in Government criminal or civil case conclusive evidence against a defendant in suits for damages both by the United States and private plaintiffs.

H.R. 8763

(1) United States may recover actual damages;

(2) any action for damages by United States or private plaintiffs shall be forever barred unless commenced within six years after the cause of action accrued;

(3) suspension of statute during pendency of Government criminal, civil or *damage* suit, applicable to private suits;

(4) judgment in Government criminal or civil case (but not in Government damage suit) *prima facie* evidence in damage suits both by United States and private plaintiff.

82nd Congress, 1st Session

H.R. 3408 and 1323

identical with H.R. 8763 (1950).

H.R. 1986

six years after discovery of facts by private plaintiff.

H.R. 109

treble damages in Government suits.

83rd Congress, 1st Session.

H.R. 467

(1) five-year statute of limitations applicable to Government and private damage suits;

(2) when suspended by Government criminal or civil suit, private suit had to be commenced either during period of suspension, or within five years after cause of action accrued;

(3) causes of action barred by state statutes on the effective date of the act would not be revived;

(4) eliminated provision suspending statute during pendency of Government damage suit.

EXHIBIT B.

CELLER - PATMAN COLLOQUY

"Mr. Patman: Mr. Chairman, after the word 'accrued' in line 7, page 2, I have an amendment prepared to include the phrase 'and became known', so as to make it clear that the cause of action or that limitation would not commence to run against a cause of action until it is discovered, until it became known, and, therefore, I would like to ask the chairman of the committee this question: Is it your understanding, Mr. Chairman, that the cause of action will not commence to run, the limitation will not commence to run on the cause of action until after it is discovered, 4, 6 or 10 years hence?

"Mr. Celler: The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. An action could have accrued and the person aggrieved might

not have heard of it for 20 years. Under the suggested amendment he would have a right to bring an action after 20 years, after the evidence will have been lost, and the defendant would be put in a rather deplorable situation in that regard. *We provide that the 4-year statute shall start to run from the time the wrong was done, not from the time of discovery.*

"Mr. Patman: Even in the case of fraud or conspiracy?

"Mr. Celler: No. In the case of fraud or conspiracy the statute of limitations only runs from the time of discovery.

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all.

"Mr. Patman: Mr. Chairman, the proposal for inserting the words 'and become known' after the word 'accrued' in line 7, page 2, is to emphasize and make clear in the law that the period of limitations shall not commence to run until at least covert wrongs have been discovered. We should make certain that in enacting a uniform Federal statute of limitations we will not be acting to limit the damage period to 4 years, even though a monopolistic conspiracy may have lasted for 10 years before the victim even knew of its existence. Perhaps the amendment I propose will not insure fully against such unjust result, but it will serve to improve the provision which has been presented in H.R. 4954 in making certain that the action is not barred until a period of 4 years after the victim learned of the existence of his cause of action." 101 Cong. Rec. 5132-33 (1955).

EXHIBIT C.

PLAINTIFF'S POINTS AND AUTHORITIES.

I.

The applicability of the Federal Doctrine of Fraudulent Concealment to Section 4B of the Clayton Act is not a case of first impression. Two previous cases have involved the same question and have applied the doctrine to toll Section 4B of the Clayton Act.

Moviecolor, Ltd., v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961), Cert. denied 368 U.S. 821 (1961).

Dovberg v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961).

Both cases state that the doctrine of Federal Fraudulent Concealment tolls the running of the statute of limitations contained in the Clayton Act.

II.

The Federal Doctrine of Fraudulent Concealment is read into every statute of limitations governing federally created rights unless a clear unequivocal intent to the contrary is expressed by the Congress.

Sherwood v. *Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782 (D.N.H. 1828).

Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875).

Traer v. *Clews*, 115 U.S. 528 (1885).

Kirby v. *Lake Shore R.R.*, 120 U.S. 130 (1887).

Exploration Co. v. *United States*, 247 U.S. 435 (1918).

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946).

It should be noted that the Supreme Court in the *Holmberg* case states that the equitable doctrine of Fraudulent Concealment is read into every federal statute of limitation.

III.

The clear expression of the congressional intent requires the application of the Federal Doctrine of Fraudulent Concealment to Section 4B of the Clayton Act.

The Supreme Court of the United States has never refused to apply doctrine of Fraudulent Concealment to any statute of limitation nor has it ever announced that a substantive statute of limitation is immune to equitable considerations.

Grossman v. *Young*, 72 F. Supp. 375 (S.D.N.Y. 1947).

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

The *Glus* case would seem to dispel any remaining doubt that equitable considerations can toll a statute of limitation incorporated into a statutory cause of action.

The colloquy between Congressman Patman and Congressman Celler on the floor of the House clearly reveals that Congress intended the doctrine of Fraudulent Concealment would toll the statute of limitation of the Clayton Act (Cong. Rec., Vol. 101, Part 4, pp. 5132-3, 84 Cong. Fed. Sess. (1955)).

> "Mr. Patman: Even in the case of fraud or conspiracy?
>
> "Mr. Celler: No, in the case of fraud or conspiracy the statute of limitation only runs from the time of discovery."

Congressman Celler as chairman of the House Judiciary Committee and Floor Manager of the bill clearly recognized the distinction between a *discovery bill* which was rejected and *the then existing doctrine of Fraudulent Concealment.*

IV.

The discovery doctrine and the Federal Doctrine of Fraudulent Concealment are absolutely different and have no relation to each other.

Tinkoff v. *United States*, 211 F.2d 890 (7th Cir. 1954).

Suckow Borax Mines Consolidated, Inc., v. *Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950).

Moviecolor, Ltd., v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961) Cert. Denied 368 U.S. 821 (1961).

Dovberg v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961).

V.

The applicability of the Federal Doctrine of Fraudulent Concealment will not abrogate the congressional intent for uniformity because this doctrine is read into every federal statute of limitation.

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946).

The language adopted by Congress under which the limitation period begins after a cause of action "accrues" itself indicates that the Fraudulent Concealment Doctrine is applicable, because it has been held that causes of action do not accrue when there is concealment until after the concealment is broken.

Exploration Co. v. *United States*, 247 U.S. 435 (1918).

Kirby v. *Lake Shore R.R.*, 120 U.S. 130 (1887).

Kicklighter v. *New York Life Ins. Co.*, 145 F.2d 548 (5th Cir. 1944).

EXHIBIT D.

DEFENDANTS' POINTS AND AUTHORITIES.

I.

This is a case of first impression. Cases such as *American Tobacco Company, Crummer, Philco, Norman* and *Moviecolor* dealt with state statutes of limitations which were applicable prior to the enactment of Section 4B of the Clayton Act. Since the state statutes were statutes of general application not enacted by the sovereign that created the right which plaintiff asserts, they must be regarded as procedural and subject to the federal rule that procedural statutes are tolled by fraudulent concealment. The discussion of the application of the doctrine of fraudulent concealment to Section 4B of the Clayton Act, which is found in *Moviecolor*, is, by the court's own admission, merely dicta and is not persuasive.[1]

American Tobacco Company v. *People's Tobacco Company*, 204 Fed. 58 (5th Cir. 1913).

Crummer Company v. *DuPont*, 117 F. Supp. 870 (N.D. Fla. 1954), 223 F.2d 38 (5th Cir. 1955), 255 F.2d 425 (5th Cir. 1958).

Philco Corp. v. *Radio Corporation of America*, 186 F. Supp. 155 (E.D. Pa. 1960).

Norman Tobacco and Candy Co. v. *Gillette Safety Razor Corp.*, 197 F. Supp. 333 (N.D. Ala. 1960).

Moviecolor, Limited, v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961).

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1. Had there in fact been a question of limitations in *Dovberg* v. *The Dow Chemical Company*, 195 F. Supp. 337 (E.D. Pa. 1961), Section 4B of the Clayton Act would have been involved. However, there was no reason to consider the statute of limitations in that case and the court's discussion of the problem must be regarded as dicta.

II.

Congress has the power to enact a definitive statute of limitations which is not subject to tolling for any reason whatsoever.

Holmberg v. *Armbrecht*, 327 U.S. 392, 395 (1946).

Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59, 64 (1953).

Adams v. *Albany*, 80 F. Supp. 876, 881 (S.D. Cal. 1948).

Congress in enacting Section 4B of the Clayton Act plainly and unequivocally barred all claims under Section 4 of the Clayton Act filed more than four years after such claims accrued. Inasmuch as the language of Section 4B is plain and unequivocal, there is no need to resort to other aids of statutory construction.

Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59, 64 (1953).

Soriano v. *United States*, 352 U.S. 270 (1957).

United States v. *Borin*, 209 F.2d 145, 147 (5th Cir. 1954), cert. den. 348 U.S. 821 (1936).

Adams v. *Albany*, 80 F. Supp. 876, 881 (S.D. Cal. 1948).

Conclusive proof that there was to be no implied exception to the bar created by Section 4B is found in the fact that at the same time Congress expressly enacted in Section 5(b) the one exception to the absolute bar contained in Section 4B. Where Congress has used general mandatory language and has imposed one or more explicit exceptions, the Court has no power to read in an additional exception.

Soriano v. *United States*, 352 U.S. 270 (1957).

Kendall v. *United States*, 107 U.S. 123, 125 (1883).

III.

Section 4B, being a substantive part of the statute creating a cause of action, extinguishes the cause of action and cannot be tolled except by express legislative authority. The courts have consistently held that where the time for commencing an action is prescribed in the statute which creates the liability and gives the right of action, the time is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitations.

Pollen v. *Ford Instrument Co.*, 108 F.2d 762 (2nd Cir. 1940).

The Harrisburg, 119 U.S. 199 (1886).

A. J. Phillips Co. v. *Grand Trunk Western Railway Co.*, 236 U.S. 662 (1915).

Scott v. *Railroad Retirement Board*, 227 F.2d 684 (7th Cir. 1955).

United States ex rel. Texas Portland Cement Co. v. *McCord*, 233 U.S. 157 (1914).

Leimer v. *Woods*, 196 F.2d 828 (8th Cir. 1952).

United States v. *Borin*, 209 F.2d 145 (5th Cir. 1954) Cert. den. 348 U.S. 821 (1956).

Adams v. *Albany*, 80 F. Supp. 876 (S.D. Cal. 1948).

See also, *Frazee* v. *Partney*, 314 S.W.2d 915 (S. Ct. Mo. 1958).

As long as the statute of limitations is specifically directed at the right created by statute, it is immaterial that the limitations provision may be contained in a different statute or may have been passed subsequent to the enactment of the statute creating the right.

Davis v. *Mills*, 194 U.S. 451 (1904).

Midstate Horticultural Co. v. *Pennsylvania R. Co.*, 320 U.S. 356 (1943).

IV.

The legislative history of Section 4B is consistent with the plain meaning of the statutory language. During the six years prior to the enactment of Section 4B in 1955, Congress had before it numerous bills to establish a uniform federal statute of limitations for treble damage antitrust actions. Congress was repeatedly urged to insert a fraudulent concealment exception and held extensive hearings on the advisability of such an exception, but consistently refused to adopt any such proposals.

See schedule appearing at pages 16-18 of brief filed by co-defendants.

The eleventh-hour colloquy between Congressman Patman and Congressman Celler on the floor of the House (Cong. Rec. Vol. 101, part 5, pp. 5132-33, 84th Cong., 1st Sess. (1955)) cannot be given any weight in view of the consistent refusal of both the House and Senate to include a fraudulent concealment exception.

Pennsylvania R.R. Co. v. *International Coal Mining Co.*, 230 U.S. 194 (1913).

Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

Brown Shoe Co. v. *United States*, U.S. , CCH 1962 Trade Cases, Par. 70,366, decided June 25, 1962.

V.

If the doctrine of fraudulent concealment is read into Section 4B, the Congressional effort to establish a uniform federal statute of limitations to replace the multiple statutory limitations periods resulting from applying state laws will be completely nullified and every conspiracy case will have its own individual statute of limitations. Certainly this is contrary to Congressional intent.

APPENDIX B.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Plaintiffs,
against
GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.
} 61 Civ. 4258 and Related Cases.

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FEINBERG, D. J.:

Defendants in 418 related treble damage actions[1] brought under the Clayton Act (15 U.S.C. §15) have moved under Rule 12(f), Fed. R. Civ. P., to strike material from plaintiffs' complaints. Plaintiffs are public utilities, state and local governmental agencies or units and industrial corporations. Defendants include large national manufacturers of heavy electrical equipment. Comparable private treble damage suits have been instituted over the nation, and roughly 1800, including those in this District, are now pending. The impetus for this massive litigation was supplied by criminal and civil injunctive proceedings brought by the United States Government against many of these defendants in 1960 in the Eastern District of Pennsylvania; the complaints before this Court were filed between November, 1961 and March, 1962.

The complaints generally allege that defendants combined and conspired to fix prices and rig bids with respect

1. Each action affects two or more defendants; 39 have been named in all. There are over 100 plaintiffs in the actions which state more than 1700 claims.

to the sale of specified electrical equipment[2] and that plaintiffs' damages are based on their purchases from defendants during a period ranging from at least the 1940's to 1960.[3] Most of the complaints also allege that defendants actively and fraudulently concealed the existence of the alleged conspiracy, and that plaintiffs neither knew of the conspiracy nor, by the exercise of reasonable diligence, could have gained knowledge of its existence until they learned of the government suits in 1960.

Three motions by defendants were brought on by notice of motion dated May 25, 1962; on successive days in June, the motions were ably argued on the basis of thorough and well-reasoned briefs. The first motion, to which this opinion is limited, is based upon the applicable four-year statute of limitations, Section 4B of the Clayton Act ("Section 4B").[4] Defendants move to strike from the complaints all allegations of damages claimed for any period

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2. The general product groups affected by the alleged conspiracies are: bushings, circuit breakers, condensers, distribution transformers, hydro-electric generators, industrial control equipment, instrument transformers, insulators, isolated phase buses, lightning arresters, low voltage distribution equipment, low voltage power circuit breakers, meters, network transformers, open fuse cutouts, power capacitors, power switchboards and control equipment, power switchgear assemblies, power switching equipment, power transformers, turbine generators.

3. The initial and terminal dates of the alleged conspiracies and the dates of alleged purchases by plaintiffs vary. In some cases the conspiracies alleged began as late as January, 1956, and January, 1958, so that limitations problems in these actions are absent or perhaps minimal.

4. "Limitation of actions. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C., §15b.

prior to the time period indicated by Section 4B and the related Section 5(b),[5] as well as allegations of fraudulent concealment of any alleged unlawful combination or conspiracy. Illustrative of allegations to which this motion is addressed are these:

> "Beginning at least as early as January, 1948 and continuing thereafter until at least as late as June, 1960, the defendants, co-conspirators and other persons presently unknown have engaged in a combination and conspiracy in restraint of interstate trade and commerce in turbine-generators in violation of § 1 of the Sherman Act (15 U.S.C. § 1).
>
> * * * * * * *
>
> "The defendants and co-conspirators used various devices and practices to conceal the existence of their conspiracy. . . . The defendants and co-conspirators also rigged price quotations and bids to purchasers and so represented their prices to plaintiffs as to create the semblance of competitive bidding and pricing and thereby deceived plaintiffs into thinking that they were receiving competitive prices. By reason of these and other deliberate acts, the defendants and co-conspirators fraudulently concealed the existence of their combination and conspiracy and plaintiffs had no

5. "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws; but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." 15 U.S.C., §16(b).

knowledge and could not by the exercise of reasonable diligence have obtained knowledge of the existence of the combination and conspiracy until the institution of the proceedings described in paragraph 15."[6]

The crucial question for determination is one of statutory construction; *i. e.*, is Section 4B construed to allow its four-year time period to be tolled by fraudulent concealment? In support of the proposition that it is not,[7] defendants, *inter alia*, rely on the wording of the statute, the legislative history of Section 4B, and a contention that the statute cannot be suspended on a non-statutory ground because it is substantive and not procedural in character. Plaintiffs argue principally that a doctrine of fraudulent concealment is read into every federal statute of limitations; the legislative history of Section 4B demonstrates that fraudulent concealment applies to private damage actions for antitrust violations, "artificial" formulae such as "substantive-procedural" notwithstanding, and the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*[8] has held that fraudulent concealment tolls Section 4B of the Clayton Act.

I am persuaded that *Moviecolor* provides the complete answer to all of defendants' contentions; therefore, I will

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6. 61 Civ. 4258, paras. 12, 16.

7. "Defendants contend that all causes of action accruing more than four years prior to the date of institution of the proceedings by the United States relative to the same product and matter complained of in each complaint are barred. . . . Where no proceeding by the United States related to the same matter and product covered by a complaint, or where a defendant here was not a party to a proceeding related to such matter and product, all claims asserted therein which accrued more than four years prior to the filing of the complaint are barred." Brief for Defendants, pp. 2-3.

8. 288 F.2d 80, *cert. denied* 368 U.S. 821 (1961), *aff'g* 1960 Trade Cas. ¶69,692 (S.D. N.Y. 1960).

discuss the case in some detail. Initially, I note that the parties concede that Section 4B applies to cases filed after January 7, 1956, whatever the date of accrual of the cause of action;[9] they differ only on the effect of concealment.

I.

Moviecolor was an action for treble damages under Section 4 of the Clayton Act. Plaintiff Moviecolor was a British corporation formed in 1929 and dissolved in 1939. Its action presumably accrued in 1929 or the early 1930's but was not brought until 1959.[10] Section 4B was asserted as a defense in the answers. Defendants then moved for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P., claiming that the action was barred by "both the applicable state and federal statutes of limitations."

The District Court judge granted the motion. He pointed out that Section 4B had become effective on January 7, 1956, that prior to that time the federal courts looked to the statute of limitations of the states in which they sat, and that Section 4B made clear that if, on its effective date, state law barred the claim, Section 4B would not revive it. Therefore, he examined the New York statute of limitations (N.Y.C.P.A. § 48(2)) to see whether the claim was barred on January 7, 1956. The District Court judge held that under New York law fraudulent concealment did not toll the New York statute of limitations. The crucial issue, therefore, was whether what he called "the federal equi-

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9. See *Herman Schwabe, Inc., v. United Shoe Machinery Corp.*, 274 F.2d 608 (2 Cir.), *cert. denied* 363 U.S. 811 (1960) (4B to be given retroactive interpretation). My opinion does not deal with the question of when the various causes of action accrued.

10. The action, brought by a "liquidator" of plaintiff corporation named in 1955, was characterized by one of the defendants as a "stale claim by a phantom plaintiff."

table doctrine" of *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1874), was available to toll the state statute. He concluded that it was not, even though the action was brought to enforce a federally created right, because the action was at law rather than in equity. It is clear from the opinion that the District Court would have reached a contrary result, on the authority of *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), had the action been in equity.

Thereafter, plaintiff appealed. In an opinion by Judge Friendly speaking for a unanimous Court, the reasoning of the holding below was explicitly overruled. The Court stated (288 F.2d at 83):

> "We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period. . . ."

The Court of Appeals, however, did not reverse the judgment of the District Court. It went on to consider the additional question of whether plaintiff's complaint alleged facts sufficient to bring it "within the federal concealment rule."[11] Since it concluded that the complaint did not meet that test, the judgment for defendants was affirmed.

Defendants attempt to minimize the controlling effect of *Moviecolor*. They urge that *Moviecolor* is not a holding that the fraudulent concealment doctrine applies to Section 4B but is *dictum* at best, that the decision applies only to a state statute of limitations, and is inapplicable to the main issue here.[12] They attempt to buttress this position by contending that the issue of whether Section 4B is tolled

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11. 288 F.2d at 86.

12. Brief for Defendants, pp. 44, 47. Consistent with that position, defendants do not argue that the actions are barred by state statute.

by fraudulent concealment was not fully briefed before the Court of Appeals.[13] However, analysis of *Moviecolor* compels the conclusion that the appellate court necessarily found that fraudulent concealment applies to Section 4B.

The complaint in *Moviecolor* was filed in 1959 on a claim which had aged for almost 30 years. The lower court explicitly,[14] and the Court of Appeals implicitly, recognized that Section 4B applied to the complaint before it.[15] If the doctrine of fraudulent concealment did not apply to the action in *Moviecolor* and, therefore, did not toll the four year time limit of Section 4B, then the action was clearly barred since the claim arose almost 30 years before. Only if the doctrine of fraudulent concealment *did* apply and *did* toll Section 4B was it necessary for the Court of Appeals to reach the next question: was the action already barred by state law before the effective date of Section 4B? This inquiry was required because Section 4B also states that no action already barred under state law prior to the effective date of Section 4B shall be revived by Section 4B.[16] This, too, had been recognized by the Court below.[17] Therefore, to reach the ultimate issue decided in *Moviecolor*—that the federal fraudulent concealment doctrine also tolled the New York statute of limitations—the Court of Appeals first decided that fraudulent concealment was an existing federal doctrine and that it attached to Section 4B.

The Court of Appeals further decided, on policy grounds and the imputed purpose of Congress, that a uni-

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13. Reply brief for Defendants, p. 36.

14. 1960 Trade Cas. at 76,727.

15. The *Schwabe* case, *supra*, note 11, made this clear.

16. "No cause of action barred under existing law on the effective date of this section . . . shall be revived . . ." 15 U.S.C. §15(b).

17. 1960 Trade Cas., at 76,728.

form rule was to be preferred in the federal courts on the effect of the wrongdoer's concealment on the measuring period. This explains the significance of the word "even" in the holding already quoted above (288 F.2d at 83):

> "the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act *even* when a state statute is used to measure the period . . ." (Emphasis supplied).

The Court was satisfied that the result was in accord with legislative intent. Thus, it stated (*id.* at 84):

> "It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, as under the Clayton Act, enforcement of the right often serves not merely private but public ends . . ."

It reinforced this reference to Congressional intent by the following footnote (*ibid*):

> "The debates on the 1955 amendment of the Clayton Act to provide its own period of limitation for treble damage actions, 69 Stat. 283, include statements by Representative Celler, chairman of the House Judiciary Committee, in answer to a question by Representative Patman, that under existing law the period of limitation ran only from discovery and that the new statute would not change that. 101 Cong. Rec. 5129, 5130, 5133 (1955)."

Moviecolor makes abundantly clear the view of the Court of Appeals that fraudulent concealment applies to Section 4B.[18] It is this view which defendants say is *dic-*

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18. *Cf.* 75 Harv. L. Rev. 627 (1962) which criticizes the court's failure to borrow the entire New York law on fraudulent concealment, but states (at p. 629): "That the New York legis-

tum and may, therefore, be disregarded. Whether that view is *dictum* is questionable, since I believe it was an essential element in the process of decision. But, in any event, even if it is *dictum*, its controlling effect is undiminished. Although the appeal could have been disposed of on the basis of the inadequacies of the complaint alone, the Court of Appeals made clear that it would consider broader issues and why it was doing so (288 F.2d at 83):

> "we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule. Although we could dispose of this appeal solely on the latter ground, we think it proper to deal also with the important question of law decided by the District Court, since the issue has been fully argued, the decisions in the Southern District are in conflict, and the problem is likely to recur."

Therefore, it underlined the fact that its views on the subject of "the federal rule as to the effect of concealment on the running of a period of limitations" were carefully considered.[19] Moreover, the argument that *Moviecolor* should be disregarded because the question was inadequately presented to the Court of Appeals rests upon a number of questionable hypotheses. It assumes that even if this assertion were true, this Court should disregard the judgment of its

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lature did not include a rule of concealment may be the reason that it made the period of limitations as long as six years; in the recently enacted federal statute that now governs limitations in Clayon Act suits, for example, the specified period is four years, *and, of course, concealment applies.*" (emphasis supplied).

19. See *General Electric Co.* v. *Hygrade Sylvania Corp.*, 61 F. Supp. 476, 525-526 (S.D. N.Y. 1944) ("judicial" and "obiter" dicta distinguished); *United States* v. *Ellis*, 264 F.2d 325, 328 (2 Cir. 1959) ("frequently the pronouncement characterized as dictum rests upon a quite solid foundation"); *but cf. Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821); *Nolan* v. *Transocean Air Lines*, 290 F.2d 904, 906 (2 Cir.), *cert. denied* 368 U.S. 901 (1961).

senior court. It assumes that because the legislative history of Section 4B was not briefed in the Court of Appeals in *Moviecolor*, that Court's study of the legislative history was incomplete. It further assumes that because some of the cases upon which defendants rely were not discussed in the opinion of the Court of Appeals, they may not have been considered by that Court, and that consideration of these cases would lead to a different result.[20] I cannot agree with these assumptions. Accordingly, on what I conceive to be the clear authority of *Moviecolor*, defendants' motion is denied.[21] On this view of the case, it is not necessary to deal with the other contentions of the parties.

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20. Defendants urge that the Court of Appeals would reconsider its action in the light of *United States* v. *Borin*, 209 F.2d 145 (5 Cir. 1954) or its earlier decision in *Pollen* v. *Ford Instrument Co.*, 108 F.2d 762 (2 Cir. 1940). But the *Pollen* case was cited by defendant Eastman Kodak both to the District Court and the Court of Appeals in *Moviecolor* (see memorandum in support of its motion in the District Court to dismiss the complaint, p. 14; brief of defendant-appellee in the Court of Appeals, p. 29). In addition, the *Borin* case was cited to the District Court (defendant Eastman Kodak memorandum *op. cit. supra* p. 18). But *cf. Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) and *Grossman* v. *Young*, 72 F. Supp. 375 (S.D. N.Y. 1947) which plaintiff cited to the Court of Appeals in *Moviecolor*. Brief for plaintiff-appellant pp. 9, 10, 18.

21. *Cf. Gaetzi* v. *Carling Brewing Co.*, Trade Reg. Rep. (1962 Trade Cas.) ¶70,339 (E.D. Mich. 1962) (doctrine of fraudulent concealment held applicable to Section 4B, but motion for summary judgment granted; doctrine held inapplicable on the undisputed facts); *Dovberg* v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961) (motion for summary judgment on the ground that Section 4B barred the claim denied, holding that complaint sufficiently alleged fraudulent concealment); a contrary holding, according to the information furnished the Court, has been made in *Brigham City Corp.* v. *General Electric Co.* (D. Utah 1962) (unreported).

II.

Under 28 U.S.C., § 1292(b), an interlocutory appeal otherwise not available may be had in a civil action if the District Judge "shall be of the opinion" that the order in question: (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[22] Since this antitrust litigation exemplifies the type of case which in part prompted the enactment of Section 1292(b),[23] I will consider the question of whether to certify an appeal from the order to be entered on this motion.

The first and third statutory criteria stated above are clearly met. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 274 F.2d 608 (2 Cir.) *cert. denied*, 363 U.S. 811 (1960); *Banana Distributors, Inc.* v. *United Fruit Co.*, 269 F.2d 790 (2 Cir. 1959). As to the second, the practical problem here is whether a four year cut-off period will

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22. Section 1292(b) also provides that: "The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken. . . ."

23. "The bill results from a growing awareness of the need for expedition of cases pending before the district courts. . .

"There are many civil actions from which . . . illustrations could be furnished. For example, in an antitrust action a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." S. Rep. No. 2434, 85 Cong., 2d Sess., reprinted in U. S. Code Cong. & Ad. News 5255, 5256 (1958). See *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3 Cir. 1958).

be applied to claims which might otherwise, in some cases, go back to the 1940's. Determination of this question affects the scope of discovery procedure, the length and complexity of ultimate trial, and the expenditure of time, money and effort which these cases will engender. These are strong reasons for having the issue of construction of Section 4B conclusively determined and determined expeditiously. Therefore, in determining whether there is "substantial ground for difference of opinion" as to the conclusive effect of *Moviecolor*, a narrow approach is not justified. While I believe *Moviecolor* decided the issue of construction of Section 4B, I also feel that there is "substantial ground for difference of opinion" as to whether it did. On the related question of whether there is substantial ground for difference of opinion on the construction of Section 4B if *Moviecolor* is not deemed to be controlling, the test is clearly met. Without exploring the parties' contentions, their extensive analysis of the legislative history of Section 4B makes clear that here is an issue which is substantial.

Accordingly, the order will provide that I am of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation.

Settle order on notice.

Dated: New York, N. Y.

July 11, 1962

/s/ Wilfred Feinberg
U. S. D. J.

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APPENDIX "C"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY,
Respondent.

No.

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

KEITH WILSON, JR.,
City Counselor,
WILLIAM F. MAUER,
Assistant City Counselor,
2800 City Hall
Kansas City, Missouri,
Attorneys for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

COMMONWEALTH EDISON COMPANY et al., *Plaintiffs,* vs. ALLIS-CHALMERS MANUFACTURING COMPANY et al., *Defendants.*	**Civil Actions Nos. 61 C 1277, 61 C 1278, 61 C 1279, 61 C 1280, 61 C 1281, 61 C 1282, 61 C 1283, 61 C 1284, 61 C 1285.**
CENTRAL ILLINOIS LIGHT COMPANY et al., *Plaintiffs,* vs. ALLIS-CHALMERS MANUFACTURING COMPANY et al., *Defendants.*	**Civil Actions Nos. 61 C 1688, 61 C 1689, 61 C 1690, 61 C 1691, 61 C 1692, 61 C 1693, 61 C 1694, 61 C 1695, 61 C 1696.**
COMMONWEALTH EDISON COMPANY et al., *Plaintiffs,* vs. ALLIS-CHALMERS MANUFACTURING COMPANY et al., *Defendants.*	**Civil Actions Nos. 61 C 2068, 61 C 2069, 61 C 2070, 61 C 2071, 61 C 2072, 61 C 2073, 61 C 2074, 61 C 2075, 61 C 2076, 61 C 2077.**
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Plaintiff,* vs. ALLIS-CHALMERS MANUFACTURING COMPANY et al., *Defendants.*	**Civil Actions Nos. 61 C 2179, 61 C 2180, 61 C 2181, 61 C 2182, 61 C 2183, 61 C 2184, 61 C 2185, 61 C 2186, 61 C 2187.**

MEMORANDUM ON PART II OF DEFENDANTS' MOTION OF FEBRUARY 1, 1962

In this memorandum the Court is concerned with the breadth of construction to be given the statute of limitations provision of Section 4B of the Clayton Act as presented by Part II of defendants' motion of February 1, 1962. The motion, made by 27 corporate defendants, variously involved in some 37 causes, challenges

> "all allegations of damage for any period prior to the time period of the statute of limitations provided in Section 4B of the Clayton Act (15 U.S.C. § 15(b)) and all allegations relating to the alleged fraudulent concealment of the causes of action; or, in the alternative, pursuant to Rules 12 and 56, for an order of judgment dismissing:
>
> "1. Count I in each complaint wherein the same cause of action (except for the time period involved) is pleaded in two counts; and
>
> "2. All claims in each of the single count complaints and all claims in Count II of multiple count complaints for damages during periods which antedate the time limitations provided by Section 4B of the Clayton Act."

The Act provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title *shall be forever barred unless commenced within four years after the cause of action accrued.* No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

This provision was enacted July 7, 1955, to take effect six months thereafter. It is asserted that the various complaints cover as much as a twelve-year period beginning on or about January 1, 1947, and continuing until sometime in 1960, which charge the defendants as actively and fraudulently concealing the existence of the respective conspiracies.

The asserted legal bases of the motion to strike are that the statute is substantive, absolute, and bars causes unless commenced within four years after the cause of action accrued, and, the statute, not being procedural cannot be tolled for fraudulent concealment of the cause pending plaintiffs' discovery thereof.

This Court concludes that Section 4B is to be construed as being tolled by *fraudulent concealment*—as contrasted with non-tolling by virtue of mere failure of an injured party timely to *discover* the existence of a cause of action.

The bases for this conclusion are:

(1) The legislative history, especially as revealed in the colloquy between Mr. Celler, the sponsor of the provision, and Mr. Patman, confirms a Congressional intention to read into the limitations provision an exception for fraudulent concealment. The earlier tendered, and rejected, exceptions pertained to discovery, of the existence of a cause of action, and not to fraudulent concealment thereof.

(2) The limitations provision of the Clayton Act is more properly akin to procedural than substantive in nature and therefore not subject to a strict construction.

(3) The doctrine of *Bailey* v. *Glover*, 88 U.S. 342 (1874), and *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), of reading "into *every* federal statute of limitation" the equitable doctrine excepting from the statute's operation

cases of fraud, and tolling the statute therefor, is applicable to Section 4B of the Clayton Act.

These very issues have recently received consideration in five different federal districts, resulting in three holdings in accord with defendants' view that there is an inelastic four-year limitations period, and two holdings that the limitation provision is tolled by fraudulent concealment. The Court has read the transcript of proceedings in *Brigham City Corporation* v. *General Electric Company*, Civil Action No. C 16-62 and *Provo City Corporation* v. *General Electric Company et al.*, No. C 28-62, wherein Judge A. Sherman Christenson (D.C. Utah) ruled orally that he was

> "clearly of the opinion that the statute of limitations . . . cannot be deemed to have read into it the so-called doctrine of concealment or the doctrine of discovery or a conglomeration of those doctrines by which the fact finder or the Court would let the decision as to the application of the statute turn upon the degree with which either subjective intention or objective action with regard to concealment was applied or was present.
>
> "An action for conspiracy I must take as one not in the category of the traditional action for fraud. . . . These things can't be regarded as making the statutory action one as in the category of an action for fraud. I'm going to tentatively make that ruling; and unless something is called to my attention which is controlling or reasons that persuade me otherwise, I'll pursue that position. . . . I'll strike those allegations (re fraudulent concealment). . . ." (In an oral decision Judge Waldo R. Rogers of Albuquerque, New Mexico, followed that of Judge Christenson.)

Judge William H. Becker of Kansas City, Missouri, has ruled similarly in two cases[1] before him. In a memo-

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1. *City of Kansas City, Missouri*, v. *Federal Pacific Electric Company*, Cause No. 13709-1; *City of Kansas City, Missouri*, v. *General Electric Company*, Cause No. 13710-2.

randum on the ruling he stated several considerations upon which his decision was founded. He considered as significant the lack of an express exception in Section 4B suspending the running of the four year period during the time the wrong was fraudulently concealed, the defendants' elimination of provisions suspending the running of the statute until the date of discovery, and "the long established rule that, when Congress creates a new right of action and explicitly limits the time in which the action may be brought, the explicit limitation governs and is not affected by the general federal doctrine employed to bar inequitable reliance on statutes of limitation." Judge Becker also considered the subject matter of the legislation and the effect that extending the period would have upon the dockets of the courts before which these antitrust cases are pending. With respect to the latter point, he stated:

> "The foreseeable effects of the application of equitable principles of suspension and estoppel upon the ability of the courts to process anticipated litigation should be given some consideration. In this connection there is the practical consideration that these antitrust cases and other cases ordinarily on the dockets may overtax the capacities of the courts if the period of limitation can be extended backward in time as contended by the plaintiff. Congress should be assumed to have had in mind the capacity of the courts to process the authorized litigation. If plaintiff's contention is sustained there is no definite limit in time beyond which treble damage actions are barred."

In contrast, Judge Wilfred Feinberg of the Southern District of New York, denied similar motions in *Atlantic City Electric Company et al.* v. *General Electric Company*, filed July 11, 1962. He stated that he was

"* * * persuaded that Moviecolor[2] provides the complete answer to all of defendants' contentions. . . ."

In answer to the argument that the applicable statement in the opinion of Judge Friendly in the *Moviecolor* case, *supra*, was dictum, he further stated

"* * * analysis of *Moviecolor* compels the conclusion that the appellate court necessarily found that fraudulent concealment applies to Section 4B.

"The complaint in *Moviecolor* was filed in 1959 on a claim which had aged for almost 30 years. The lower court explicitly, and the Court of Appeals implicitly, recognized that Section 4B applied to the complaint before it. If the doctrine of fraudulent concealment did not apply to the action in *Moviecolor* and, therefore, did not toll the four year time limit of Section 4B, then the action was clearly barred since the claim arose almost 30 years before. . . . Therefore, to reach the ultimate issue decided in Moviecolor—that the federal fraudulent concealment doctrine also tolled the New York statute of limitations—the Court of Appeals first decided that fraudulent concealment was an existing federal doctrine and that it attached to Section 4B.

"The Court of Appeals further decided, on policy grounds and the imputed purpose of Congress, that a uniform rule was to be preferred in the federal courts on the effect of the wrongdoer's concealment on the measuring period. This explains the significance of the word 'even' in the holding already quoted above (288 F.2d at 83):

'the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act *even* when a state statute is used to measure the period. . . .' (Emphasis supplied.)

---

2. *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80 (2nd Cir. 1961).

"The Court was satisfied that the result was in accord with legislative intent. Thus, it stated (*id.* at 84):

> 'It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, as under the Clayton Act, enforcement of the right often serves not merely private but public ends. . . .'

"*Moviecolor* makes abundantly clear the view of the Court of Appeals that fraudulent concealment applies to Section 4B. . . .

"* * *. Accordingly, on what I conceive to be the clear authority of *Moviecolor*, defendants' motion is denied."

Judge Feinberg concluded the order involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal would materially advance the ultimate termination of the litigation.

In an opinion filed August 24, 1962, Judge C. William Kraft, Jr., of the Eastern District of Pennsylvania, ruled in favor of plaintiffs on this issue.[3] He rejected arguments advanced by defendants based upon the legislative history, the "clear meaning" of Section 4B and its being substantive rather than procedural, and thus not subject to being tolled by the fraudulent concealment doctrine. He concluded that:

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3. *United States of America and Tennessee Valley Authority* v. *General Electric Company*, Causes Nos. 29379, 29488, 29489, 29490 and 30297; *United States of America* v. *General Electric Company*, Causes Nos. 29491, 29492 and 29493.

"A thorough study of the legislative history impels us to the conclusion that it was the intent of Congress that the limitations provision in Sec. 4B be construed in the same manner as had the state statutes of limitations, i.e., as purely a statute of repose, affecting no substantive rights, and subject to the well-settled doctrine of fraudulent concealment."

There has also been a decision of especial pertinency in another district. In Michigan, Judge Wade H. McCree, Jr., in the case of *Gaetzi, d.b.a. John A. Gaetzi Distributing Co.* v. *Carling Co.*, decided May 25, 1962, CCH 1962 Trade Cases, ¶70,339 held:

> *"We are dealing here with a federally-created right conjoined with a federal statute of limitations. In such a case the extension of limitations is governed by 'federal equitable doctrine.' Bailey* v. *Glover,* 88 U.S. (21 Wall) 342 (1874). . . .
>
> "* * * The rationale underlying the principle (is) that *affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty.*
>
> "* * * *(C)oncealment necessitates the commission of affirmative acts. Mere silence, where there is no duty to speak, does not toll the statute."* (Italics added.)

He held that in that case the conspiracy could have been discovered by due diligence well within the statutory period.

1. *Legislative History.* Defendants lay great stress on the legislative history of Section 4B as conclusive evidence of Congressional intent to achieve strict and invariable uniformity of limitations provisions throughout the nation, where, heretofore, they state, there was a

> "morass of often conflicting and generally confusing decisions which left both plaintiffs and defendants in

> doubt as to which state's statute applied, which statute within a given state controlled, when the statute began to run, and the circumstances, if any, under which the running of the statute was tolled."

They cite the fact that the Reports from both Houses indicated that

> "one of the primary purposes of this bill (was) to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble-damage actions as well as Government damage actions, of 4 years."

Bills were initiated in 1949 providing that the statute should not begin to run until "*discovery* by the plaintiff of the facts upon which he relies for proof of the existence of conspiracy, if the plaintiff has exercised due diligence in seeking to discover such facts." The Congressional subcommittee hearing discussion revealed this language was thought necessary to protect plaintiffs against alleged instances of fraudulent concealment by conspirators. Defendants state that many witnesses objected "strongly" to the "concealment" provision, including Professor Milton Handler of the Columbia Law School, objecting on the ground that it would introduce an "uncertainty" which is repugnant to the very idea of a statute of repose. He was joined in this view by members of the New York State Bar Association and the American Bar Association. The bill passed without the "concealment" provision.

In the following Congress new bills were introduced seeking to revive the "concealment" exception, but failed. Despite Mr. Patman's efforts to insert such a provision into the Act, which became the present Section 4B, the bill

passed without it. From this history, defendants argue that a provision specifically rejected cannot be read into the statute by inference.

A minute study of the earlier bills in Congress is presented in the defendants' briefs, disclosing that Congress rejected legislation which would allegedly toll the proposed statutes of limitation by reason of plaintiff's *failure to discover* the alleged conspiracy and not for fraudulent concealment. They quote from the statements of Professor Milton Handler indicative of the nondesirability of importing into a statute of repose a mental element (the discovery element) and urging a definite limitation period, on the ground that one does not suffer injury without his knowledge. They cite the Senate Committee Report on Section 4B wherein it is stated that the Committee recognized that

> "* * * in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and over-burden the calendars of the courts. The committee believes the provisions of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.
>
> "While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the anti-trust laws."

There follows what this Court deems to be a critical colloquy between Mr. Celler, the proponent of the legislation, and Mr. Patman:

"Mr. Celler: The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. . . . *We provide that the 4-year statute shall start to run from the time of the accrual of damages*, from the time the wrong was done, not from the time of discovery.

"Mr. Patman: *Even in the case of fraud or conspiracy?*

"Mr. Celler: *No. In the case of fraud or conspiracy the statute of limitations only runs from the the time of discovery.*

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all." (Italics supplied.)

Defendants eschew this colloquy completely on the ground that "Congressmen cannot accomplish their legislative goals in this manner," citing *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U.S. 184 (1913), where it was said at p. 199:

> "But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different."

In that case, the provision contended for had been omitted from the Act as finally reported, so that the Court deemed the omission not only "significant" but "conclusive." The defendants further assert that

> "the primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a

> statement of a single Congressman, in the face of the weighty countervailing considerations present."

quoting from *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960). We do not have here the "weighty countervailing considerations present" to overcome the extremely pertinent statements of Mr. Celler, corroborated as they are by well-established judicial precedent, hereinafter discussed.

The Court concludes therefore that the legislative history of Section 4B discloses simply that the earlier bills had included proposals for tolling for *non-discovery* of the existence of a cause of action, as distinguished from tolling for fraudulent concealment, so that Congressional rejection of provisions of that nature is not significant. The colloquy of Mr. Celler and Mr. Patman, hereinabove quoted, corroborates this conclusion and further emphasizes the true intent of Congress to incorporate into Section 4B the fraudulent concealment tolling exception.

2. *Procedural or Substantive Character of Section 4B.* A legal problem fraught with confusion is presented as to the nature of the statute of limitations added by Section 4B of the Clayton Act. Defendants deem it a substantive provision, being applicable to a right created by statute and not existing at common law,[4] and therefore subject to strict construction and not expandable by implied reading into it of equitable doctrine, of tolling for fraudulent concealment. Plaintiffs on the other hand consider it procedural and subject to a liberal construction.

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4. *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F.2d 284 (7th Cir. 1954); *The Harrisburg*, 119 U.S. 199 (1886); *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356; *Scott* v. *Railroad Retirement Board*, 227 F.2d 684 (7th Cir. 1955); *United States* v. *Borin*, 209 F.2d 145 (5th Cir. 1954), cert. den. 348 U.S. 821.

The Court is of the opinion that Section 4B is procedural in nature. It was not passed as an integral part of the statute creating the right, *but many decades later*. It was passed because of the need for an overall, uniform statute to replace the application of the many varying statutes of limitations of the states where suits were instituted.

The antitrust acts, other than Section 4B, have been held entitled to broad, rather than strict construction, so there would seem to be no real reason not to extend that same breadth of construction to the newly added limitations provision.

While treble damage actions do have some aspects that could be considered punitive from a defendant's point of view, they have on the whole been construed to be compensatory, based as they are on a claimant's own damages. The treble damage suit is instituted by the claimant alone, not on the relation of the government, as in a *qui tam* or informer's suit.

Defendants point out that since many courts[5] have held Section 4 punitive, rather than compensatory, a strict construction is in order, precluding reading into the act "additional and unforeseen penalty never contemplated by Congress."

They also assert that the express inclusion of one tolling exception provision negates a Congressional intention to include any tolling provision not expressed. They stress the use of the words "any" and "forever" as significant words of the statute, Section 4B.

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5. *Sun Theatre Corp.* v. *R.K.O. Radio Pictures*, 213 F.2d 284, (7th Cir. 1954); *Hoskins Coal & Dock Corp.* v. *Truax*, 191 F.2d 912, 914 (7th Cir. 1951), cert. den. 342 U.S. 947; *Schiffman Bros.* v. *Texas Co.*, 196 F.2d 695, 697 (7th Cir. 1952).

The Supreme Court's delineation of the concepts of penal and remedial have been stated in *Huntington v. Attrill*, 146 U.S. 657, where the court said at p. 668:

> "The test of whether a law is penal, . . . is whether the wrong sought to be redressed is a wrong to the *public*, or a wrong to the *individual*, according to the familiar classification of Blackstone. . . . All damages for neglect or breach of duty operate to a certain extent as a punishment; . . . 'The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity'." (Italics supplied.)

On this point the decision in *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, is deserving of especial consideration, it being a treble-damage suit brought by a city for injuries caused by a conspiracy which affected the price the city had to pay for items it purchased. The Supreme Court held that a federal five-year statute was *inapplicable* which concerned "any 'suit or prosecution for any *penalty* or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.' . . . The construction of the phrase '*suit for a penalty*,' and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington* v. *Attrill*, 146 U.S. 657, 668; *Brady* v. *Daly*, 175 U.S. 148, 155, 156." (Italics supplied.) It was also held that the cause did not fall within the state statute of one year for "*statute penalties*."

It is apparent to the Court that these statements of the Supreme Court are binding in interpreting the character of Section 4B because we are now construing a *Federal* act,

and are no longer dealing with a state's viewpoint of its own statute.[6]

Also pertinent to this discussion are the several Seventh Circuit Court of Appeals' decisions, which have successively adhered to the interpretation that the Clayton Act treble-damage provision was punitive and therefore to be strictly construed. The Court of Appeals was, however, dealing with a fact situation *antedating* the enactment of the Federal Statute of Limitations, Section 4B in 1955, and was applying the *Illinois* statute of limitations, in consonance with the nation-wide practice of reading into the Clayton Act the state statute of limitations in the absence of any Federal statute of limitations. The Court was, therefore, confronted with the problem of *which Illinois* statute of limitations to use, conformably to the way in which *Illinois* courts had interpreted the treble damage suits to be. The three opinions, by the late Judge Lindley, were *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F.2d 284 (1954); *Schiffman Bros., Inc.*, v. *Texas Co.*, 196 F.2d 695 (1952), and *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co. et al.*, 191 F.2d 912 (1951).

In the *Sun Theatre Corporation* case, *supra*, the Court was asked to review and overrule its prior Schiffman and Hoskins decisions but it did not accede. In the *Sun Theatre* case it was said at p. 286:

> "* * * Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, *penal in nature* and susceptible therefore to all restrictions surrounding an

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6. It is interesting to note that the Supreme Court in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572 at 583 (1942), stated that "The liquidated damages for failure to pay the minimum wages . . . are compensation, not a penalty or punishment by the Government."

action of such nature . . . 'The verdict should represent actual damages sustained, and *two thirds of the judgment is a penalty* which Congress has seen fit to impose. . . .'" (Italics supplied.)

Then he cites a statement by the senatorial sponsor of the Sherman Act that it established a "penalty, three-fold damages." However, the *Sun Theatre* opinion, *supra*, goes on to make the following very significant statement at pp. 287-288:

"Plaintiff contends, with support in briefs filed by *amici curiae*, that we should reconsider our decisions in Hoskins and Schiffman cases, that an action under Section 4 of the Act is governed by the Illinois two year statute. It is urged that we overlooked the postulate announced in *Bell* v. *Farwell*, 176 Ill. 489, . . . that, for purposes of the application of Illinois law, the courts of that state accept whatever characterization is placed on a statutory cause of action by the courts of the jurisdiction enacting the statute. Applying this rule, it is said that the courts of Illinois would find, on authority of *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, . . . the remedy of treble damages provided by the Act to be remedial and, therefore, not governed by the two year statute.

"This argument is premised on a misapprehension of what was decided in Hoskins and Schiffman. As we said in the latter, 'We pointed out [in Hoskins] that *the real question facing us * * * was not whether the action was one to recover a statutory penalty within the meaning of any federal statute but whether actions such as this are limited to a period of two years under the Illinois statutes, i.e., whether actions to recover treble damages must be commenced in Illinois within two years.* It is of no significance that the cause of action arises under Federal statutes.' . . . This postulate refutes the basic premise on which plaintiff and amici rely, namely, that those cases look to the state law to characterize the

action as penal or remedial. These decisions are but a necessary consequence of the basic principle that statutes of limitation affect the remedy merely, not the substantive right.

"* * * We are . . . concerned . . . with a question of procedure, namely, what Illinois Statute limits the prosecution of a cause of action for treble damages and attorney's fees. *Irrespective of the tag affixed to a statutory cause of action, if we find that it falls within that category of suits which the courts of the state hold to be limited by the two year statute, our inquiry comes to an end.* As we indicated in *Hoskins*, 191 F.2d at page 914, this principle is in accord with *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390." (Italics supplied.)

In the *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co. et al., supra*, case, a treble damage Clayton Act case, the Court specifically pointed out at p. 913 that:

"*Congress has enacted no statute of limitations governing private actions for treble damages under the Clayton Act.* Consequently, to ascertain the applicable limitation, we must look to the statutes of the state where the cause of action arises and in which suit is brought . . . *and, in determining which of several provisions of the state statute will control, we are bound by the interpretations of those statutes by the courts of the State.* . . . 'The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals.' . . . [T]hreefold damages and attorneys fees are in the nature of a penalty not recoverable except by virtue of the statute. When 'the object is clearly to inflict a punishment on a party for violating' the statute, it is penal in character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant. . . . [Federal]

cases referring to such a recovery as a 'penalty' of triple or treble damages include [citing many cases]."

Again in *Schiffman Bros., Inc.*, v. *Texas Co.*, 196 F.2d 695 (1952), Judge Lindley speaking for the Court, said at pp. 696-698:

> "We pointed out that the real question facing us, therefore, *was not whether the action was one to recover a statutory penalty within the meaning of any federal statute* but whether actions such as this are limited to a period of two years under the Illinois statutes. . . . The decisive factor is that Congress, by its failure to prescribe a limitation, has provided by virtue of the Rules of Decision Act, 28 U.S.C.A. § 1652, that the applicable limitation must be determined by the state statute as interpreted by the courts of the state. We are not concerned at all, then, with anything other than the question of what statute of limitations of Illinois is applicable to actions to recover treble damages. . . .
>
> "The word 'penal' is not one of definite specific meaning but has variable connotations depending upon the environment in which it is utilized. . . . It is to be observed that *Illinois has specifically refused to follow the limited definition of penalty or penal action or statutory penalty prescribed by Huntington* v. *Attrill*, 146 U.S. 657. . . .
>
> "Thus the crucial question of what Illinois statute of limitations applies must be answered as it was in the *Hoskins* case. Illinois has decided that actions for treble damages . . . so far partake of actions to recover statutory penalties as to be within the statute forbidding actions to recover such damages after two years. '* * * Congress has seen fit to leave the question to the state, and we know of no qualification upon this grant of authority implicit in the failure of Congress to provide a federal statute.' (Italics supplied.)

In *Greggs* v. *Twentieth Century Fox Film Corporation*, 232 F.2d 325 (7th Cir. 1956), Judge Schnackenberg, speaking for the Court in a movie treble-damage antitrust suit, concluded that the Wisconsin statute providing for a two year statute of limitations for a statutory penalty was applicable rather than a six year provision on a statutory liability not otherwise provided for.

The Seventh Circuit is not alone in interpreting state statutes of limitation applicable to penal or forfeiture causes governing antitrust treble damage suits. The Third Circuit so held in *Gordon* v. *Loew's, Inc.*, 247 F.2d 451 (1957), in passing on a New Jersey case. It also went on to point out that it was the variance in the holdings of applicability of the various state statutes of limitation that caused Congress to pass Section 4B. Judge Holder in *Sandidge* v. *Rogers*, 167 F. Supp. 553 (1958), also concluded that the Indiana statute of limitations pertaining to penal provisions was applicable. The Eighth Circuit in *Powell* v. *St. Louis Dairy Company*, 276 F.2d 464 (1960), concluded that under the Missouri law an action brought under the Clayton Act for treble damages is penal. The *Skouras Theatres Corporation et al.* v. *Radio-Keith-Orpheum Corporation*, 179 F. Supp. 163 (D.C. N.Y. 1959), case, involving a New Jersey statute, held the statute of limitations applicable in penal causes controlling.

There are, however, several decisions in addition to those heretofore cited, which sustain a conclusion that the Federal treble damage antitrust cause of action is not deemed by Federal courts to be punitive in nature. Thus in *Englander Motor, Inc.*, v. *Ford Motor Company*, 293 F.2d 802 (6th Cir. 1961), it was said at pp. 805-6 (construing Ohio law):

> "The weight of (state) authority is on the side of the *remedial* character of the action. . . ."

"It is clear to us that under federal law private actions for treble damages under the antitrust laws *are* not regarded as penal in nature, but as compensation. . . ." (Italics supplied.)

In *Thompson* v. *North Carolina Theatres, Inc.*, 176 F. Supp. 73 (1959), it was said:

"The majority view is that a private action for treble damages under the anti-trust laws is *not an action to recover a penalty* or forfeiture but rather is an action upon a liability created by statute and is in the nature of an action of tort. It is remedial and compensatory." (Italics supplied.)

In *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F. Supp. 15 (D.C. N.Y. 1951), the Court held at p. 29:

"An action for damages under Section 4 of the Clayton Act . . . is *not one for a penalty*. The damages recoverable are, under federal law, compensatory in nature. . . .

"Under federal law when a federal cause of action involves a fraud the running of a federal statute of limitations is suspended until discovery of the fraud, despite the failure of the statute to contain such a qualifying provision. This equitable doctrine or mitigating construction is read into every federal statute of limitations. . . .

"* * * [E]ven a federal statute of limitations would be given the mitigating construction required by that doctrine." (Italics supplied.)

In *Reid* v. *Doubleday & Co., Inc., et al.*, 109 F. Supp. 354, an Ohio District Court held, in 1952:

"The majority (of Federal courts) have held that (a triple damage action) . . . was *not an action for a penalty* but rather for a liability created by statute. . . .

> It is our conclusion that under . . . the Federal law the cause of action here sued upon is *remedial rather than penal*. . . ." (Italics supplied.)

The New Jersey District Court in *Florida Wholesale Drug, Inc.*, v. *Ronson Art Metal Works, Inc.*, 110 F. Supp. 573 (1953), stated at p. 577:

> "* * * [T]he great weight of authority is to the effect that the treble damage provision of the Clayton Act *is* not penal. . . ." (Italics supplied.)

The Kansas District Court in *Fulton* v. *Loew's, Inc., et al.*, 114 F. Supp. 676 (1953), stated at p. 680:

> "A majority of the federal courts construe the *Chattanooga* case as holding that a civil recovery under the Sherman and Clayton Acts *is remedial and compensatory and not penal.*" (Italics supplied.)

In *Bertha Building Corporation* v. *National Theatres Corporation*, 269 F.2d 785 (2nd Cir. 1959), the Court of Appeals for the Second Circuit applied a state statute of limitations other than the one pertaining to penalties or forfeitures.

This construction of Section 4B as remedial rather than penal is supported by the fact of the Supreme Court's otherwise liberal rule of construction of treble damage causes and the antitrust acts, which would not obtain if the overall effect of the acts were penal. Thus it was said in *Radovich* v. *Nat. Football League et al.*, 352 U.S. 445 (1957), at p. 454:

> "Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

In *United States* v. *Cooper Corporation et al.*, 312 U.S. 600 (1941), the Supreme Court in construing Section 7 of the Sherman Act providing for treble damage cause of action, said at p. 605:

> "*Decision is not to be reached by a strict construction of the words of the Act*, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." (Italics supplied.)

Also pressed as supportive of penal character of the instant statute are cited *qui tam* and false claims causes. Prominently asserted by defendants is the case of *United States ex rel. Nitkey* v. *Dawes et al.*, 151 F.2d 639, a *qui tam* civil action under the Informer's Act, based on the theory that national bank's contract to assume and pay state bank's deposit liabilities was invalid under Illinois statute. The suit was instituted after the six year statute of limitations designated by the act had expired, but it was claimed the defendants concealed their alleged misconduct by failing to report certain liabilities in the required annual reports, and there was therefore a concealment each year which tolled the statute with respect to the original debt plus the accumulated interest thereon, and the penalties. The Court stated the section was "more than a mere statute of limitations. It is jurisdictional and strictly limits the power of the court to assume jurisdiction." The Court further cited the fact that 11 years had elapsed before the filing of the suit; that the Government had knowledge of the so-called concealed facts. It finally stated at p. 644:

> "We are dealing with a special statute relative only to qui tam actions, and it carries its own jurisdiction requirement that action be brought within six years.

> The language is plain and unambiguous and we think it should be strictly construed. It is not to be tolled or extended on account of fraud . . . for it involves jurisdiction of the subject matter, and that cannot be acquired even by consent, in opposition to the statute. . . .
>
> "'Section 232 of the Act was amended . . . drastically limiting the conditions under which qui tam suits can be instituted and carried on."

In that case the suit was *instituted* by the *United States*, and the Government entered an appearance. Bouvier's Law Dictionary defines a *qui tam* action as one "under a statute which imposes a *penalty* . . . and gives that *penalty* in part to whomsoever will sue for the same. . . . The plaintiff describes himself as suing as well for the commonwealth. . . ." (Italics supplied.) It is therefore evident that a *qui tam* action is in a class *sui generis*, and that the instant treble damage action has many differentiating factors such as purely on behalf of the private individual—the Government having its own specific remedies.

The relevancy of the ruling in *United States* v. *Borin*, 209 F.2d 145 (5th Cir. 1954), holding an action by the United States under the False Claims Act barred by the statute of limitations as being a claim penal in nature is not too apparent when it is realized the suit is by the *Government*, not by an individual for losses he sustained.

3. *Federal doctrine of Bailey* v. *Glover of tolling statute of limitations for fraudulent concealment.* In 1874 the United States Supreme Court held, in *Bailey* v. *Glover*, 88 U.S. 342, there was a principle of equity which tolled a statute of limitations for fraud, which principle was equally applicable to causes of action at law. The Court stated at p. 349:

> "But we are of opinion . . . that the weight of judicial authority . . . is in favor of the application of

the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side."

There is the flat, unlimited statement in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397, that:

> *"This equitable doctrine is read into every federal statute of limitation."*

The Court additionally said in the *Holmberg* case at pp. 396-397:

> "* * * [F]raudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be

no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' . . .

"*This equitable doctrine is read into every federal statute of limitation.* If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. . . . It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even *a federal statute in the same terms would be given the mitigating construction required by that doctrine.*" (Italics supplied.)

Now, many years after the enactment of the original act creating the right to treble damages, we have a federal statute of limitations enacted to achieve uniformity throughout the nation in such causes. One way of achieving such uniformity is for all courts to adopt the unitary *federal* construction of the nature of the cause of action, such as expounded in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906); *Huntington* v. *Attrill*, 146 U.S. 657; and *Holmberg et al.* v. *Armbrecht et al.*, 327 U.S. 392 (1946).

Defendants negate the equitable principle because under *Marshall* v. *Vicksburg*, 82 U.S. 146, 149 (1872), (two years before *Bailey* v. *Glover*, *supra*), equity never lends its aid to enforce a forfeiture or penalty. Since the Court has concluded that the Act is remedial this argument loses force.

The Court is impressed with the very pertinent decision of the Second Circuit Court of Appeals in *Moviecolor*

Limited v. *Eastman Kodak Company*, 288 F.2d 80 (2nd Cir. 1961), which contains this oft-quoted language at pp. 83-84:

> "* * * We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period. . . .
>
> "* * * [A] federal court enforcing a federally created claim looks first to federal law to determine the nature of the claim. . . .
>
> "It seems far more likely that *Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer.* This is particularly so when, as under the Clayton Act, enforcement of the right often serves not merely private but public ends." (Italics supplied.)

Defendants contend that a tolling of the statute of limitations for fraudulent concealment would vitiate the very purpose of the statute—an effective "firm," uniform time bar. They point out that the essence of a conspiracy in restraint of trade is concealment, citing *Grunewald* v. *United States*, 353 U.S. 391 (1957), a criminal case where the Court said at pp. 401-402:

> "* * * [A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret. . . . Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases. . . ."

Continuing at pages 405-406, the Court said:

> "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely

because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces. . . .

"* * * But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained. . . .

"* * * [N]o agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the evidence before us to have been part of the conspiratorial agreement."

Defendants further cite the "explicit" and unambiguous language of the Act which "forever" bars a cause not brought within four years of its accrual, as precluding a court from reading into it an exception of tolling for fraudulent concealment.[7]

Additional stress is laid by defendants on the alleged fact that for the six years prior to the enactment of Section 4B in 1955 Congress was repeatedly urged to engraft such an exception, but "repeatedly and expressly" refused to engraft such an exception. Further they point out that plaintiffs would not lose all their claims for relief herein since a portion thereof are timely sued upon.

Some defendants also maintain that if the fraudulent concealment doctrine be read into Section 4B there will

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7. *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953), wherein the Court differentiated the portal-to-portal act from the Fair Labor Standards Act. Similarly, *United States* v. *Borin*, 209 F.2d 145 (5th Cir. 1954), cert. den. 348 U.S. 821 (False Claims Act); *United States* v. *Dawes*, 151 F.2d 639 (7th Cir. 1945), cert. den. 327 U.S. 788; *Adams* v. *Albany*, 80 F. Supp. 876 (D.C. Cal. 1948); *Soriano* v. *United States*, 352 U.S. 270 (1957).

be recreated "the very confusion and chaos which Congress sought to eliminate." They contend that there will have to be a determination of what constitutes discovery of the causes of action. Further, there would have to be a jury determination as to what constitutes "due diligence" in uncovering the accrual of the cause of action.

They point out that since conspirators inevitably seek to cloak their activities in secrecy, tolling the statute during the concealment of a conspiracy means tolling the statute in every conspiracy case, yet Congress specifically intended to establish a fixed and uniform statute of limitations. They urge that any statute of limitations presupposes the barring of meritorious claims.

Defendants limit the *Holmberg*[8] doctrine to cases where fraud is the gravamen of the action, and as inapplicable to substantive legislation providing for punitive damages.

They maintain that the enactment of Section 4B in 1955 without a fraudulent concealment exception must be interpreted in the light of repeated Congressional rejection of such an exception during the preceding six years. Defendants reject plaintiffs' differentiation of the prior tendered exceptions as pertaining only to "discovery" tolling provisions as being simply the other side of the "coin" of fraudulent concealment exception doctrine, and Congress' earlier rejections of a discovery exception tolling the statute was tantamount to a rejection of a fraudulent concealment exception.

Defendants refute the existence of a long line of cases decided prior to the enactment of Section 4B as stating any affirmative concealment doctrine which Congress could be presumed to have adopted. They read the *Holm-*

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8. 327 U.S. 392, 396.

berg v. *Armbrecht* (327 U.S. 392, 397), decision not as requiring a showing of definite and specific acts committed knowingly to conceal a wrong but involving a case "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part'" where "'the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" And *Bailey* v. *Glover* (88 U.S. 342), holds concealment established when a fraud "is of such a character as to conceal itself."

They cite *State of Oklahoma ex rel. Phillips, Governor of Oklahoma* v. *American Book Co. et al.*, 144 F.2d 585 (10th Cir. 1944), wherein it was held a claim was barred under the state statute, and it was not tolled by the nondiscovery of the claim, the claim not being one for fraud within the meaning of the state statute.

There have been several interesting law review comments on the applicability of the equitable doctrine of tolling for fraudulent concealment.

In a very recent article, "Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles, appearing in 57 Northwestern University Law Review, pages 29-52 (by Grant W. Wiprud), it is said at page 50:

> "Thus, in at least three circuits (the Second, Fifth, and Ninth) *it has been recognized at the appellate level that fraudulent concealment of a cause of action for treble damages under the antitrust laws operates to toll the statute of limitations*, and that the suspension of the period of limitations continues as long as the concealment continues."

In a note in an Annotation, "Equitable estoppel as precluding reliance on statute of limitations" appearing in 3 L.Ed. 1886, it is said at p. 1887:

> "It is obvious that *federal law governs the question whether and in what circumstances the doctrine of equitable estoppel may be invoked against pleading a federal statute of limitations in an action based on a federal right.* . . . The doctrine of equitable estoppel is applicable to bar inequitable reliance on a statute of limitations."

In a 1933 law review article (Fraudulent Concealment and Statute of Limitation, John P. Dawson, 31 Mich. Law Review, at pages 875 and 918, it was said:

> "In a recent article the writer has discussed a common exception to statutes of limitation—the exception for claims based on undiscovered 'fraud.' It was there pointed out how useful this exception has been made through the *wide definition of 'fraud' that is now fully established.* By judicial decision 'fraud' has been extended far beyond the field of misrepresentation of fact into the twilight zones of 'constructive fraud' and out toward the open spaces of naked tort. . . ."
>
> "The 'fraudulent concealment' exception has been used over a very wide field to relax statutory rules for the limitation of actions. . . ."

In a 1950 article in 63 Harvard Law Review, on Developments in the Law, it was said at pp. 1220 and 1235:

> *"When the defendant fraudulently conceals from the plaintiff the existence of a cause of action, postponement of the limitations period is as equitable as in the fraud exception,* for the only difference is that the wrong in this case, although concealed, exists independently of the fraud. . . . Indeed, acts of fraudulent concealment might often be regarded as constituting a fraud depriving the plaintiff of his cause of action. . . ."

> "Where the substantive time limit is one created by the federal government, to disregard the state exceptions may be justified by the desire for a maximum degree of uniformity in the enforcement of federal rights. . . . But the federal courts have been willing to invoke the exceptions which have been traditionally implied by the judiciary, and which therefore do not depend upon diverse state statutes. . . ."

In 75 Harvard Law Review, at p. 627, (a case comment on Moviecolor) it was stated:

> "* * * [I]n the recently enacted federal statute that now governs in Clayton Act suits, for example, the specified period is four years, and, *of course, concealment applies.*"

Many decisions have expatiated on the concept of fraudulent concealment reaching the conclusion it encompasses an active conduct on the part of the perpetrator.[9] There is an exhaustive annotation in 173 A.L.R. 576, on "What constitutes concealment which will prevent running of statute of limitations." It is there said at pp. 578 and 585:

> "According to the majority rule, however, fraudulent concealment of a cause of action from the one in whom it resides by the one against whom it lies constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of

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9. *Felix* v. *Patrick*, 145 U.S. 317, 331 (1892); *Magee* v. *Manhattan Life Ins. Co.*, 92 U.S. 93 (1875); *Files* v. *Rankin*, 153 Fed. 537 (8th Cir. 1907); *Goster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F.2d 742 (9th Cir. 1936); *Schram* v. *Hurt*, 111 F.2d 557 (6th Cir. 1940); *Hickok Producing & Development Co.* v. *Texas Co.*, 128 F.2d 183 (5th Cir. 1942); *Arkansas Natural Gas Co.* v. *Sartor*, 78 F.2d 924 (5th Cir. 1935); *Northern Trust Co.* v. *Essaness Theatres Corp.*, 103 F. Supp. 954 (D.C. Ill. 1952).

discovery of the fact by the owner of the cause of action.

"* * * This rule finds application most frequently in actions based upon fraud or in which fraud is the gist of the action, but *it is by no means restricted to actions of that character*. The rule applies regardless of the nature of the cause, if the requisite element of fraudulent concealment of the cause of action is present and it applies in actions at law as well as in suits in equity."

"The rule is quite generally accepted, particularly in modern cases, that, in the absence of a fiduciary or other trust or confidential relationship between the parties, *an affirmative act on the part of the defendant tending toward concealment is necessary, and that passivity, such as silence on his part, is not sufficient, in order to constitute such a concealment as to toll the statute of limitations*, at least where the basis of the action was not fraud and the silence a continuation of the original fraud."

Another pertinent annotation is that on the "Effect of fraud to tell the period for bringing action prescribed in statute creating the right of action" appearing in 15 A.L.R. 2d 500, wherein the writer concluded "there is a definite conflict of authority" as to the "question of whether a statute which creates a right or cause of action and also imposes a limitation of time within which proceedings for its enforcement may be commenced admits of an implied exception whereby the limitation period may be tolled or suspended in case fraud is shown to have prevented timely commencement." He decides that

"The basic question is whether, in the creation of a right which may be an extremely valuable one and far more vital to the beneficiary than many of those previously existing, by comparison, the lawmaking

body *meant to attach a condition* to its enforcement which must be construed as absolute under all circumstances, in the absence of an express exception."

He further states:

"In certain cases of a more or less general nature wherein statutes creating a cause of action not theretofore existing were construed with reference to the effect of fraud or fraudulent concealment calculated to prevent commencement of enforcement proceedings within a time limited in the statute therefor, courts have felt compelled to hold, in accordance with apparently well-settled construction, that enforcement was conditioned upon commencement within the prescribed period and that the latter could not be tolled or suspended for any reason not expressly excepted by the statute. . . .

"In certain other cases of a general nature, however, courts have expressed a dissatisfaction with the logical basis of the construction previously described, and have, by ruling or legitimate inference, either rejected it or construed particular statutory provisions creating a right of action as entirely inconsistent with the proposition that a limitation prescribed thereby was intended to operate as an absolute condition, preventing tolling or suspension in the event that fraud or fraudulent concealment should be shown to have prevented a timely commencement of enforcement proceedings."

Defendants differentiate the case of *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), as inapplicable, the right under FELA being not a statute creating substantive rights, but simply codifying procedural common law rights. They cite many cases of more recent times supporting a distinction between substantive and procedural statutes of limitation.

However, the Supreme Court uses language in the *Glus* opinion which would indicate a Federal attitude generally applied on the concept of fraudulent concealment. It said at p. 232:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. *Deeply rooted in our jurisprudence this principle* has been applied in many diverse classes of cases *by both law* and equity courts and has frequently been employed *to bar inequitable reliance on statutes of limitations.*" (Italics supplied.)

The Court concludes that difficult as its conclusion may render the discovery process of this litigation, it must deny the defendants' motion in Part II, to strike the allegations antedating the designated statutory period and the allegations of fraudulent concealment. It is of the opinion that it was the Congressional intent to incorporate in Section 4B the well-established Federal doctrine that there is read into every federal statute of limitation the equitable doctrine of tolling of the statute for fraudulent concealment. This was indicated by the verbal exchange between the proponent of the legislation before its passage and another Representative. Such an interpretation has been reached in the many decisions hereinbefore quoted from at length. Implicit in these conclusions is the belief that Congress did not intend that co-conspirators could spin and weave an impenetrable shroud of fraudulent concealment to cloak their illegal acts and then fraudulently render themselves immune with the shield of the statute of limitations to bar redress by those who are the victims of their conspiratorial machinations. The treble-damage provision should be considered in Federal law as compensatory rather than punitive and therefore not strictly construed. Cases to the contrary were construing state statute of limitations of

varying phraseology. The Supreme Court has in other respects indicated that these antitrust acts are to be given broad construction.

This Court realizes the importance of this aspect of the litigation and the contrariety of judicial views and would welcome and recommends an immediate review of this determination on appeal.

The motion to strike contained in Part II of the Defendants' Motion dated February 1, 1962, is denied.

EDWIN A. ROBSON
Judge

August 28, 1962.

Supreme Court, U.S.
FILED
OCT 1 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 122.

OCTOBER TERM 1962

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY,
Respondent,

AND

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 422.

OCTOBER TERM, 1962.

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY,
Respondent.

AND

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

COURT RULE INVOLVED.

Supreme Court of the United States, Rule 20—*Certiorari to Court of Appeals Before Judgment.*

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See United States v. Bankers Trust Co., 294 U.S. 240; Railroad Retirement Board v. Alton R. Co., 295 U.S. 330; Rickert Rice Mills v. Fontenot, 297 U.S. 110; Carter v. Carter Coal Co., 298 U.S. 238; Ex parte Quirin, 317 U.S. 1; United States v. United Mine Workers, 330 U.S. 258; Youngstown Co. v. Sawyer, 343 U.S. 579.

ADDITIONAL STATEMENT OF THE CASE.

The two civil actions which are the subject of this single petition seek treble damages under the anti-trust laws. No relief other than money judgment is sought.

The district court entered judgment in each case on July 15, 1962. Notice of appeal was filed the same day and the appeal was docketed in the United States Court of Appeals for the Eighth Circuit on July 20, 1962. The Petitioner filed a motion to advance the case on the docket of that court on July 26, 1962, and the Respondents advised the court that they did not oppose the motion, but felt that briefing time should not be shortened. The court did not formally rule on the motion but, on August 8, 1962, issued a docket setting the case for hearing on October 2, 1962. The brief and record of the Appellant (Petitioner here) were filed on August 31, 1962, and the Appellees' brief was filed on September 25, 1962. This petition for certiorari was not filed until September 10, 1962.

ARGUMENT.

The Petition Is Premature Since There Is No Showing of Imperative Public Importance of Immediate Decision Within The Meaning of Rule 20 of This Court.

We do not minimize the importance of these cases or of the questions presented. Rule 20 of this Court suggests, however, that the normal appellate processes are to be bypassed only in the most extraordinary cases, invplving substantial public importance, and in which time is of the essence.

In *Cooper* v. *Aaron*, 357 U.S. 566 (1958), an order postponing the effective date of a desegregation plan had been entered on June 23, 1958. It was imperative that there be a review of this order prior to the following September, in time for the opening of school. This Court nevertheless called for the hearing and decision of the case by the Eighth Circuit Court of Appeals, and denied the petition for accelerated grant of certiorari.

All of the cases cited in Rule 20 involve emergency conditions requiring immediate decision. In *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935), the validity of clauses in contracts and leases calling for payment in gold was called into question, and pending decision the parties to these contracts were put to serious uncertainties as to what to pay or what kind of tender to make. *Railroad Retirement Board* v. *Alton Railway Co.*, 295 U.S. 330 (1935), involved the validity of a retirement plan affecting thousands of employees and calling for continuing contributions by employees. *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110

(1936) and *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), dealt with the validity of excise taxes on processors, which were then being collected, and in which refunds would be extremely difficult if the taxes were to be held invalid since they were passed on to the ultimate consumers. *Ex parte Quirin*, 317 U.S. 1 (1942), involved the validity of a wartime trial of German spies by a military commission at a time when it might be expected that other spies would be landed. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), involved the validity of executive action designed to prevent the shutdown of vital industries, by reason of labor disputes.

To these cases may be added *Wilson* v. *Girard*, 354 U.S. 524 (1957), involving a district court injunction against a trial by a foreign government.

The cases which are the subject of the present petition are important cases, but we do not believe that they are emergency cases where irreparable injury may occur unless there is an immediate determination by this Court. The ultimate resolution of the question presented may be important in many other cases, but this is frequently true of cases on the docket of this Court. It is submitted that there is no need for undue haste at the expense of thorough deliberation.

There appears to be little basis in fact for the petitioner's assertion that trial preparations in the other pending cases similar to this one are at a standstill. This Court of course has judicial notice of the work of the Murrah committee and of the steps it is taking to promote orderly discovery and trial preparation.

The proceedings in the court of appeals are progressing expeditiously and should be allowed to continue to final judgment there.

CONCLUSION.

The present petition should be denied, or consideration thereof should be deferred until judgment in the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI, *Petitioner,*

v.

FEDERAL PACIFIC ELECTRIC COMPANY
and
GENERAL ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF WESTINGHOUSE ELECTRIC CORPORATION AND ALLIS-CHALMERS MANUFACTURING COMPANY FOR LEAVE TO FILE BRIEF AMICI CURIAE IN OPPOSITION AND BRIEF

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October 9, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI, *Petitioner,*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION OF WESTINGHOUSE ELECTRIC CORPORATION AND ALLIS-CHALMERS MANUFACTURING COMPANY FOR LEAVE TO FILE BRIEF AMICI CURIAE IN OPPOSITION

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Westinghouse Electric Corporation (Westinghouse) and Allis-Chalmers Manufacturing Company (Allis-Chalmers) respectfully move the Court for leave to file

the attached brief *amici*. Petitioner has refused to consent to the filing of such brief.

Westinghouse and Allis-Chalmers are two of the defendants in the more than 1700 electrical equipment treble damage suits now pending in the federal courts. Petitioner seeks review of a question which is germane to the vast majority of those cases. While the circumstances of the present case are such that Westinghouse and Allis-Chalmers have not been included as defendants in this action, they are parties in substantially all other jurisdictions where the question presented in the petition has been or will be decided. Accordingly, in a very real sense, Westinghouse and Allis-Chalmers are parties in interest in the present proceeding and, therefore, they request leave to file the attached brief in opposition to the petition.

Respectfully submitted,

RICHARD S. RIGHTER,
CARL E. ENGGAS,
Attorneys for Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company

JOHN H. PICKERING
Of Counsel

October 9, 1962

IN THE

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OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI, *Petitioner*,

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FEDERAL PACIFIC ELECTRIC COMPANY
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BRIEF FOR WESTINGHOUSE ELECTRIC CORPORATION AND ALLIS-CHALMERS MANUFACTURING COMPANY AS AMICI CURIAE IN OPPOSITION

INTEREST OF AMICI CURIAE

The interest of Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company, as *amici curiae*, is set forth in their motion for leave to file this brief, to which motion this brief is annexed.

QUESTION PRESENTED

Whether the interpretation of § 4B of the Clayton Act (15 U.S.C. § 15(b)), which applies a four-year statute of limitations to private antitrust actions, is of such imperative public importance as to justify deviation from normal appellate processes and require immediate settlement in this Court, prior to judgment in the Court of Appeals.

RULE INVOLVED

Rule 20 of the Rules of this Court which reads:

"20.

"CERTIORARI TO A COURT OF APPEALS BEFORE JUDGMENT.

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579."

STATEMENT

On February 9, 1962, petitioner sued respondents in the Western District of Missouri under § 4 of the Clayton Act (15 U.S.C. § 15) for treble damages.* Petitioner's claims arise out of the matters which were

* Petitioner filed a separate suit against each respondent, but the matter has been treated as one case by the filing of a single petition for certiorari here.

the subject of civil and criminal proceedings by the United States in the Eastern District of Pennsylvania in 1960 against manufacturers of electrical equipment, and are part of the 1700-odd treble damage actions which have been brought as a result of those proceedings.

Because the transactions sued upon here had occurred more than four years prior to the filing of the complaints, petitioner sought to avoid the four-year limitation of § 4B of the Clayton Act (15 U.S.C. § 15(b)) by alleging that respondents had "fraudulently concealed" the existence of the asserted conspiracy until a date within the limitations period. On July 16, 1962, the district court sustained respondents' motions to dismiss and for summary judgment, on the ground that the doctrine of "fraudulent concealment" did not operate to toll § 4B, and that the claims were time barred. On the same day petitioner appealed to the Court of Appeals for the Eighth Circuit and the case was thereafter specially advanced on its docket. Subsequently, on September 10, 1962, petitioner filed the instant petition for certiorari in advance of judgment by the Court of Appeals. Meanwhile, the case has been briefed in that court, was argued before it on October 2, 1962, and is now awaiting decision by it.

ARGUMENT.

This case does not come within the requirements laid down by Rule 20 of this Court for the extraordinary procedure of review in advance of judgment by the Court of Appeals. Petitioner fails to make the showing required by the Rule and instead argues in effect simply (1) that the question decided by the district court (erroneously, in petitioner's view) must even-

tually be settled by this Court, and (2) that the decision of the district court has brought the electrical equipment litigation throughout the country to "a standstill". The first argument is insufficient and the second is incorrect.

1. This Court has emphasized that the power to by-pass the courts of appeals "has been exercised but rarely", and has made clear that it is not enough to have an important question which requires prompt adjudication. *Aaron* v. *Cooper*, 357 U.S. 566, 567. Accordingly, and as the earlier cases cited in Rule 20 illustrate, the grant of certiorari before judgment by a court of appeals is reserved for situations which are both of such overwhelming public importance and so emergent in nature as to leave no other choice.

That is not the case here. Instead, all relevant considerations—the unprecedented volume of the electrical equipment treble damage actions, the great number of parties, the magnitude of the damages claimed, the fact that money judgments are the only relief sought, and the fact that this litigation is "protracted litigation" which is being specially handled under the auspices of the Judicial Conference (Pet. 5) and is proceeding in an expeditious fashion—bespeak the wisdom of requiring the full measure of judicial consideration and adherence to the normal appellate processes. The issue raised here—whether the doctrine of "fraudulent concealment" applies to § 4B of the Clayton Act—is involved in many of the suits but has not yet been ruled upon by any court of appeals in the context of this litigation. Such rulings will not be long in coming, for the issue is presently before numerous

district courts and has been decided by seven.* Indeed, it may be decided at any moment by the Court of Appeals below which heard argument on October 2, 1962, less than eight months after the instant case was begun.

Whether this Court will have to review the rulings of the courts of appeals will depend, of course, upon circumstances as they develop, including whether conflicting or uniform views emerge, and the importance of the matter. Meanwhile, neither the possibility that this Court may eventually have to pass on the issue, nor the claim that it has been erroneously decided by the district court here, warrants foregoing the benefit inherent in intermediate consideration by the courts of appeals.

2. It is not the case, as suggested by petitioner (Pet. 6), that litigation of the 1700-odd electrical equipment treble damage actions has been halted by the decision last July of the district court in this case. This Court

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* There are two other unreported district court decisions in accord with the decision of the district court in this case: *Brigham City Corporation, et al.* v. *General Electric Company, et al.* (District of Utah, September 28, 1962, No. C 16-62, and related cases); *Public Service Company of New Mexico* v. *General Electric Company, et al.* (District of New Mexico, July 31, 1962, No. 4924 Civil, and related cases). There are four unreported district court decisions to the contrary: *Atlantic City Electric Company, et al.* v. *General Electric Company, et al.* (Southern District of New York, July 11, 1962, 61 Civ. 4258, and related cases, Pet. App. B); *Commonwealth Edison Company, et al.* v. *Allis-Chalmers Manufacturing Company, et al.* (Northern District of Illinois, August 28, 1962, Civil Action No. 61 C 1277, and related cases, Pet. App. C); *United States of America and Tennessee Valley Authority* v. *General Electric Company, et al.* (Eastern District of Pennsylvania, August 22, 1962, Civil Action No. 29379, and related cases); *Public Service Company of Colorado, et al.* v. *Allen-Bradley Company, et al.* (District of Colorado, September 11, 1962, Civil Action No. 7349, and related cases).

can take notice of the continuing activities of the Judicial Conference and the Subcommittee on Multiple Litigation of the Judicial Conference Committee on Pretrial Procedure to promote orderly discovery and trial preparation of this volume of cases. Under such auspices, these cases are proceeding rapidly in all jurisdictions. The recommendations of that Subcommittee are being carried out, discovery is proceeding, a voluminous bulk of material is being produced, and depositions are now being conducted.

3. Finally, it falls to these *amici*, who are defendants in many of the actions throughout the country but who were not joined as defendants in this case, to point out that the present petition involves only one of the hundreds of plaintiffs and only two of the numerous defendants in the mass of the electrical equipment litigation. Thus, this case not only fails to meet this Court's criteria for the extraordinary step of review before judgment by the Court of Appeals, but is a singularly inappropriate one for such review since many of the persons who would be affected would not be in a position to be heard as parties.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

RICHARD S. RIGHTER
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Counsel for Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company, as amici curiae.

JOHN H. PICKERING
Of Counsel.

October 9, 1962.

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OCTOBER TERM, 1962

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, *Petitioner*,

v.

FEDERAL PACIFIC ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, *Petitioner*,

v.

FEDERAL PACIFIC ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers (hereafter referred to as "NIMLO") is composed of over 1200 municipalities located in each of the 50 states, Puerto Rico, and the District of Columbia. These municipalities have filed over 500 complaints in 20 Federal Courts and many of them have joined together in a cooperative effort to press their treble-damage actions under the Clayton Act (15 U.S.C. § 15) following the criminal and civil injunctive proceedings brought by the United States Government in 1960 against certain manufacturers of electrical equipment, including the defendants herein. This cooperative endeavor is designed to save time and expense and to relieve burdens

matter would scarcely have been raised by the defendants in many District Courts.

2. As a further reason for immediate treatment of the limitation issue, this Court should recognize the increasingly heavy burden which has been and will continue to be thrust upon the Federal judiciary as each of the 25 District Courts, where treble damage cases are now on file, is in turn asked by the defendants to interpret Section 4B of the Clayton Act.[1] This is underscored and highlighted by the fact that (as *Amici Curiae* Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company point out, at p. 5 of their Brief) *seven* District Courts have had to decide motions to strike material from the plaintiffs' complaints on the ground that Section 4B of the Clayton Act is not tolled by fraudulent concealment. As the *Amici Curiae* Brief also points out (at p. 5), *three* of the District Courts, which have had the question before them, decided in favor of the defendants, while *four* other District Courts have decided to the contrary, for the plaintiffs. Thus, a patent conflict exists among the District Courts.[2] Judge Robson, of the Northern District of Illinois, in recently determining the effect of fraudulent concealment on the Clayton Act, has pointed to this conflict by saying that "This Court realizes the importance of this aspect of the litigation and the *Contrariety of judicial views* and would welcome and recom-

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[1] Such judicial effort involves, of course, subsequent appellate review of each lower court decision, with all the resulting effort necessarily associated with such a series of appeals.

[2] A new element in the conflict has been added by the decision of the United States Court of Appeals for the 8th Circuit, which on November 6, 1962, reversed the opinion of the lower court, the Western District of Missouri, in the instant case. *City of Kansas City, Missouri* v. *Federal Pacific Electric Company and General Electric Company*, Nos. 17,117 and 17,118, 8th Cir., November 6, 1962.

mends an immediate review of this determination on appeal." (Emphasis supplied.) (Slip Opinion, p. 11, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, Civ. No. 61 C1277, N.D. Ill., August 28, 1962.) Complementing this judicial statement is another by Judge Arraj of the District of Colorado, who, in *Public Service Co. of Colorado* v. *Allen-Bradley Co.*, emphasized the positive nature of the widely divergent judicial views on the association of fraudulent concealment and Section 4B in his statement that "Both lines of reasoning set forth in these decisions . . . provide a strong justification for adopting either alternative in this highly important litigation." (Slip Opinion, p. 4, Civ. No. 7349, D. Colo., September 21, 1962.)

If the issue is not resolved now by this Court, the respondents and *amici curiae* will force a substantial portion of the judicial machinery of this country to be laboriously and indefinitely involved with rulings on the doctrine of fraudulent concealment as it applies to the Clayton Act. This will present the real threat of a continuing interference with other litigation. Such a result is totally undesirable and can be avoided if this Court settles the matter at this time.

Conclusion

In view of the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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NOVEMBER 13, 1962.

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Petitioner,

FEDERAL PACIFIC ELECTRIC COMPANY,

Respondent,

and

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION,

Petitioner,

GENERAL ELECTRIC COMPANY,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT GENERAL ELECTRIC COMPANY ON PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION,

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v.

GENERAL ELECTRIC COMPANY,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT GENERAL ELECTRIC COMPANY ON PETITION FOR CERTIORARI

Opinion Below

On November 6, 1962, the United States Court of Appeals for the Eighth Circuit handed down an opinion reversing the judgments of the District Court in the two cases which are the subject of this petition.

We are advised that copies of the opinion have been furnished by the Clerk of the Court of Appeals for all members of this Court.

Suggestions

(1) We are advised that there is no case in which a petition for certiorari has been granted at the behest of a prevailing party in a Court of Appeals. It has been suggested, moreover, that the grant of certiorari on such a petition would involve substantial questions as to whether a case or controversy exists, and would be inconsistent with this Court's settled refusal to entertain an appeal by a party who is successful in the lower court. See Stern and Gressman, Supreme Court Practice, Second Edition, page 15.

(2) After consideration of the opinion of the Eighth Circuit Court of Appeals, this respondent is preparing and proposes to file a petition for rehearing pursuant to the rules of that Court, setting forth controlling matters of law which this respondent claimed the Court overlooked. Such a petition is due within twenty days following the date of judgment, which was November 6, 1962.

(3) Under these circumstances we suggest that it would be unwise to assume a jurisdictional problem such as is presented by the instant petition, which was filed before decision in the Court of Appeals. We therefore suggest that certiorari be not granted on the present petition.

Respectfully submitted,

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